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THE
EXCHEQUER REPORTS.

REPORTS OF CASES

ARGUED AND DETERMINED IN THE

Courts of Exchequer & Exchequer Chamber.

VOL. II.

**EASTER TERM, 26 VICT., TO HILARY TERM, 27 VICT.,
BOTH INCLUSIVE.**

BY
EDWIN TYRRELL HURLSTONE, OF THE INNER TEMPLE,
AND
FRANCIS JOSEPH COLTMAN, OF THE INNER TEMPLE,
ESQUIRES, BARRISTERS-AT-LAW.

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J U D G E S
OF THE
COURT OF EXCHEQUER,
DURING THE PERIOD COMPRISED IN THIS VOLUME.

The Right Honourable Sir FREDERICK POLLOCK, Knt., Chief Baron.

BARONS.

Sir SAMUEL MARTIN, Knt.

Sir GEORGE WILLIAM WILSHERE BRAMWELL, Knt.

Sir WILLIAM FRY CHANNELL, Knt.

Sir JAMES PLAISTED WILDE, Knt.

Sir GILLERY PIGOTT, Knt.

ATTORNEYS-GENERAL.

Sir WILLIAM ATHERTON, Knt.

Sir ROUNDALL PALMER, Knt.

SOLICITORS-GENERAL.

Sir ROUNDALL PALMER, Knt.

Sir ROBERT PORRETT COLLIER, Knt.

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ERRATA.

Page 143, last line, *for* "if they had not had," *read* "if the then mortgagees had not."

280, line 13 from the bottom, *for* "plaintiff," *read* "defendant."

348, line 6 from the bottom, *for* "Rutland," *read* "Wales."

355, marginal note, line 35, *for* "his," *read* "their."

Exchequer Reports.

EASTER TERM, 20 VICT.

GOUGH v. EVERARD.

1863.

April 29.

THIS was an interpleader issue to try, as between the claimant, the now plaintiff, and the execution creditor, the now defendant, the right to goods, seized by the sheriff of Breconshire, on the 11th of July, 1862, under a fi. fa. issued on the 9th of July, by the now defendant, against one Henry Ernest.

At the trial, before *Bramwell*, B., at the sittings after last Hilary Term, the following facts appeared.—Ernest, the execution debtor, had been in business as a land agent and timber merchant, and had occasionally employed the plaintiff as a builder and in the sale of timber. In 1859 Ernest gave up business and employed the plaintiff to assist him in trying to sell off some timber at Brecon, a portion of which was stored at a private wharf belonging to Ernest, and the remainder at a public wharf in the custody of a wharfinger. Ernest had a house in Brecon which, having previously himself occupied, he, in November, 1860, let to

The “possession or apparent possession” of a vendor or mortgagor, under the Bills of Sale Act (17 & 18 Vict. c. 36), is in general a question of fact.

Where personal chattels had been sold under written agreements not registered under the Act, and after the sale remained in the same place in which they had been kept by the vendor, but there were circumstances to shew that the vendee had done more

than take mere formal possession of them, and upon an interpleader issue, after seizure under a fi. fa., the jury found bona fides in the transactions:—*Held*, that the property seized was not in the “apparent possession” of the vendor within the meaning of the interpretation clause, and that upon the facts proved there was sufficient evidence of actual possession by the vendee so as to prevent the operation of the statute.

Quere, whether the agreements (set out in the text) were bills of sale within the meaning of the Act?

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one Thompson, reserving the right to use certain rooms, and keeping a servant and some office furniture on the premises. The plaintiff when employed by Ernest was permitted by him to use these rooms; but Ernest, who came occasionally to Brecon, did not himself use them after the house was let to Thompson. The plaintiff had occasionally used the rooms prior to April, 1862, in which month Thompson gave up the house, but he used them more continuously after that date. On the 1st of April, 1862, the following written agreement was entered into between Ernest and the plaintiff for the purchase by the plaintiff of the above mentioned timber:—

“ Mr. Henry Ernest agrees to sell to Mr. William Hodges Gough, who agrees to purchase, all the timber (rough and converted), barrows, spokes, elves, gates and other articles and materials and effects of the said H. Ernest upon his private and upon the public wharf at Brecon, and also his timber waggon there, &c., at the price or sum of 300*l*., to be paid for by the acceptance of the said W. H. Gough at four months' date. The said H. Ernest agrees to pay all rent and other charges upon the said timber and materials at Brecon for a period of six months, within which time the said W. H. Gough is to remove the same. The said W. H. Gough is to have the use of the apartments of the said H. Ernest, and of his servant there, at any time during the said six months, free from charge, to facilitate his sale and removal of the said timber,” &c.

“ H. Ernest.

“ William H. Gough.”

The apartments mentioned in this agreement were those in the house let to Thompson, which were a short distance from Ernest's private wharf. The plaintiff, in pursuance of the agreement, accepted a bill at four months for 300*l*. The plaintiff offered the timber for sale on different occasions,

both before and after the date of the said agreement, and took purchasers to see it, but the only sales which he effected were subsequent to that date, being sales to two purchasers of a part of the timber at the private wharf. It did not appear that any notice had been given to the wharfinger at the public wharf that the timber lying there had been sold by Ernest to the plaintiff.

On the 19th of June the following written agreement was entered into between Ernest and the plaintiff for the purchase of the office furniture by the plaintiff.

"The undersigned Henry Ernest agrees to sell and the undersigned William H. Gough agrees to purchase all and singular the office and household and other fixtures, fittings, furniture, goods and chattels and effects whatsoever in and about the house and stable, garden and premises in Glamorgan Street, Brecon, lately occupied by Mr. T. W. A. Thompson at the price of 50*l*. Mr. Gough is to be at liberty to hold possession of the said premises without charge until the completion of the repairs to the property of Mr. Ernest in Glamorgan Street, and either to remove or sell the property above mentioned by auction or otherwise on the premises. The said 50*l*. is to be paid as follows:—Mr. Gough is to pay the amount due to the servant Mary Price for wages, board and other disbursements up to the end of the current month of her service, and further 2*l*. 18*s*. 6*d*. for one month's wages and board by way of warning. Also to pay any rates, taxes, &c., due for the premises, and to carry the balance, if any, to the credit of his building account (Brecon) against Mr. Ernest.

"H. Ernest.

"W. H. Gough."

The servant mentioned in the above agreements kept the key of the private wharf, and prior to the first agreement the plaintiff's practice was, when for Ernest's purposes he

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required access to the timber, to get the key from her and return it. About the period when the agreement of the 1st of April was made, but at what exact time did not appear, the plaintiff obtained the key, and subsequently gave it to his son, who had since retained it for his father. The repairs mentioned in the agreement of the 19th of June were, by a previous agreement of the 19th of April, to be done upon four houses, two of which were to be ready for occupation by the end of June, and the others as soon afterwards as possible. The repairs were not completed on the 10th of July, 1862, when the whole of the property contained in the agreements of the 1st of April and the 19th of June, was seized by the sheriff under the *fi. fa.* issued at the suit of the defendant. Upon these facts being proved, the Judge left to the jury the question whether the transaction was *bonâ fide* or merely colourable, and the jury found a verdict for the plaintiff, leave being reserved to move to enter the verdict for the defendant for the whole or part of the goods, with power for the Court to draw inferences on any matters of fact.

J. Karlake, on a former day in this Term, obtained a rule nisi accordingly, on the ground, first, that the instruments under which the claim arose were not registered as required by statute; secondly, that the goods were in the possession or apparent possession of the assignor, and subject to execution.

Shee, Serjt., and *Day* shewed cause (a).—First, the written documents are not bills of sale within the Bills of Sale Act (17 & 18 Vict. c. 36), but mere memoranda of agreements. By the interpretation clause, in the 7th section of that Act, “the expression *bill of sale* shall include bills of sale, assignments, transfers, declarations of trust without transfer, and other assurances of personal chattels,

(a) April 28, 1863.

and also powers of attorney, authorities, or licences to take possession of personal chattels as security for any debt, but shall not include the following documents, that is to say, assignments for the benefit of the creditors of the person making or giving the same; marriage settlements; transfers or assignments of any ship or vessel or any share thereof; transfers of goods in the ordinary course of business of any trade or calling; bills of sale of goods in foreign parts or at sea; bills of lading; India warrants; warehouse keepers' certificates; warrants or orders for the delivery of goods, or any other documents used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorize, either by indorsement or by delivery, the possessor of such documents to transfer or receive goods thereby represented." The documents which the Act contemplates must be either under seal, or at all events formal instruments of transfer. [*Martin*, B.—"A bill of sale is a solemn contract under seal, whereby a man passes the right or interest that he hath in goods and chattels:" *Tomlin's Law Dictionary*.—He also referred to *Sheppard's Touchstone*, tit. "Bargain and Sale."] It is clear, therefore, these documents are not in strictness bills of sale, and although the interpretation clause gives this word a more extended signification, the case of *Allsop v. Day* (a) shews that the clause will be construed with strictness, and that a document is not within it merely because it contains the terms of a contract of sale between the parties. *Pollock*, C. B., there said :—"If there is any clause which ought to be construed with strictness, it is a clause which declares that one thing shall mean another." These documents are not "assurances." The term "assurance" has a recognized legal acceptation, and imports something by which property is assured. The words "*other assurances*" shew that in the

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(a) 7 H. & N. 457.

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contemplation of the legislature the instruments previously enumerated are "assurances." The instruments subsequently enumerated are foreign to this case. It cannot be inferred that because the interpretation clause specially excepts certain documents, they would if not excepted fall within its general words. Again, these agreements are "transfers in the ordinary course of business of a trade or calling" within the exception in the interpretation clause.

Secondly, the goods were not in the possession or apparent possession of the execution debtor. With regard to the goods at the private wharf, the other side may, perhaps, rely on the language of the interpretation clause. "Personal chattels shall be deemed to be in the '*apparent possession*' of the person making or giving the bill of sale, so long as they shall remain or be in or upon any house, mill, warehouse, building, works, yard, land, or other premises *occupied by him*, or as they shall be used or enjoyed by him in any place whatsoever, notwithstanding that formal possession thereof may have been taken by or given to any other person." The latter words restrict the preceding definition. The plaintiff had not mere formal possession, but exclusive manual control over the timber. The execution debtor owned the private wharf, but did not *occupy* it. The preamble of the enactment shews that the object of the legislature was to prevent fraud. Here the bona fides is established by the verdict of the jury.—They proceeded to argue on the facts, that none of the property was at the time of seizure in the possession or apparent possession of the execution debtor.

J. Karlake and Pinder, in support of the rule (a).—The property seized was in the possession or apparent possession

(a) The Court directed them to confine their arguments to the second point, intimating that, if their opinion should on that point be adverse, the decision of the other question would become unnecessary.

of the execution debtor. The timber at the private wharf was in his "apparent possession," as defined by the express words of the interpretation clause. He was the *occupier* of the wharf and liable to the rates. The key was a mere symbol of possession which gave to the plaintiff that formal possession to which the Act refers. [*Pollock*, C. B.—The whole of the timber lying at the private wharf was sold to the plaintiff, and the key gave him the *actual* possession of it.] The object of the legislature was to prevent frauds on creditors by giving publicity to transactions of this nature. The Act should therefore receive a liberal construction. That view was adopted by the Court of Common Pleas in Ireland in the case of *Sheridan v. M'Cartney* (a), which is an authority distinctly in point. In that case the defendant, the owner of certain land, in answer to a proposal from one Brooke to purchase his growing crops, wrote, accepting the proposal, and authorizing him to do everything necessary for the culture and preparation of the land. Brooke employed his own men to tend and cultivate the crops, and dismissed the men whom the defendant had employed. The crops having been seized by the sheriff under a *fi. fa.* at the suit of the plaintiff, it was held that they were in the apparent possession of the defendant within the meaning of the Bills of Sale Act, as being on land occupied by him, and that the defendant's letter to Brooke not having been registered under the Act, the crops were liable to the plaintiff's execution. As to the timber on the private wharf, this case cannot be distinguished.—They then argued, upon the facts, that there was no evidence of any transfer of the possession of any of the property.

Cur. adv. vult.

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POLLOCK, C. B., now said.—I am of opinion that this rule

(a) 11 Irish Com. Law Rep. 506.

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should be discharged. At the trial the inquiry was principally directed to the bona fides of the transaction, which the jury, with the entire approval of the learned Judge who presided, have established by their verdict.

The question for our decision is, whether the Bills of Sale Act operates to avoid this transaction upon the ground that the instruments were not registered under it, and that there was no such complete delivery of possession by the vendor as to take the case out of that statute.

I am of opinion that the possession of the plaintiff, the vendee of the goods, was so complete that the provisions of the statute do not apply. The timber at the public wharf was completely under his control; it was in his possession as far as it was capable of being, and it was not in the possession of the vendor. As to the timber on the private wharf the plaintiff had actually sold a part of it; the key of the wharf had been delivered to him, and he had manual control over the timber. The furniture in the house was as much in his possession as it could be. The question raised is, indeed, as my brother *Martin* remarked during the argument, rather one of fact than of law. In the course of the argument the case of *Sheridan v. M'Cartney* (a) was cited on the part of the defendant. I do not desire to question the correctness of that decision, although there are other authorities with which that case is apparently at variance; but the judgment of the Court there professes to proceed upon a *liberal* construction of this Act, which in my judgment ought not to be strained from its *true* construction. If any class of Acts ought to be construed strictly, it should be those which, having for their object the prevention of fraud, have in certain cases a tendency to invalidate bona fide contracts. Where fraud does not exist, this Act should at all events receive no more than its true construction.

(a) 11 Irish Com. Law Rep. 506.

But whether the decision of that case be correct or not it differs widely from the present. The ground upon which the judgment of the Court there professed to proceed was, that where, upon the sale of a growing crop, the land had remained in the possession of the owner, without lease or demise of any kind to the vendee, the instrument by which the growing crop was disposed of ought to have been registered, and that not being so, the crop remained in the possession of the owner of the soil. But no question of that kind arises here. The property which was here seized was in the possession and under the control of the plaintiff. I am therefore of opinion that this rule should be discharged.

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MARTIN, B., said.—I am of the same opinion. This is a case in which a vendor agreed to sell specific chattels to a vendee at a fixed and ascertained price. By such a contract of sale, which is termed in law a “bargain and sale,” the property passes from the vendor to the vendee, and at common law the possession of a chattel follows the property. By this transaction, as proved by the written documents, the plaintiff, who was the vendee, became the owner and in possession of these goods. Whether the Bills of Sale Act was intended to apply to a case like the present may be doubtful, and upon that point I express no opinion. But I am clearly of opinion that there was evidence to go to the jury that the plaintiff was in actual possession of the whole of this property.

With respect to the timber on the public wharf, it was probably ordinary felled timber, which was lying with its bark stripped off, as it is commonly seen on a wharf near the bank of a river or canal, for the purpose of being removed when convenient. The timber of other persons probably lay there also, and it may well be that no

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one except the plaintiff and the clerk who had the management of the wharf knew to whom this timber belonged. The plaintiff proposed to sell it, and with that object took persons to see it, who would naturally conclude that it belonged to the plaintiff, though possibly there might be other persons who, knowing that it had once belonged to the vendor, might think that it still continued to be his property. I am unable to see in this any evidence of "apparent possession" in the vendor, or indeed in anyone. The vendor had ceased to have any interest in the timber. If anything happened to it he would suffer no loss. By the ordinary rule of the common law it had become the property of the vendee, and he was as much in possession of it as under the circumstances he could be. If there was any question for the jury, it would be whether this property was or was not in the actual possession of the vendee? And this any jury would upon such evidence have answered in the affirmative. But this is not the question for our decision. The question is, whether my brother *Bramwell* could have withdrawn the case from the jury, and held, as matter of law, that notwithstanding the property had been sold, and the price paid, the vendee could under the circumstances be deprived of his possession at common law. I am of opinion that such a direction would have been wrong.

With regard to the goods on the private wharf, the case is still stronger. The plaintiff had actually taken the key of the private wharf in which the timber was, and this key was in the possession of his son at the time of the seizure. As to the furniture in the house, the plaintiff was in the occupation of the house and in possession of his own furniture, and upon what principle it can be claimed by the judgment creditor I am at a loss to understand.

Upon the question whether the written documents were such as to require registration I express no opinion, since we

only heard the argument on one side. The point which I decide is, that there was evidence to go to the jury, that all this property was in the possession of the vendee.

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BRAMWELL, B., said.—I am of opinion that this rule should be discharged for the reasons which have been stated by my brother *Martin*. Whether the written documents were within the Bills of Sale Act I offer no opinion. But assuming that they were, the plaintiff is, I think, nevertheless entitled to judgment for the whole of this property; for unless the property was in the “possession or apparent possession” of the maker of the bill of sale at the time when the process was executed, the Act does not apply. Now this was clearly not so as to the furniture. The house was not in the occupation of the vendor but of the plaintiff, and the furniture was in the plaintiff’s use. So also as to the timber on the private wharf. The plaintiff had taken possession as much as he could do so, and did not deem it necessary to remove the timber to premises in his exclusive occupation. The timber on the public wharf was not in the actual possession of the vendor, but of the wharfinger. Was it then in the vendor’s “apparent possession”? The expression is remarkable, for, as possession is itself a thing which appears, I do not see how the “actual possession” and the “apparent possession” can be in different persons, unless some wider definition be given to these words by the language of the interpretation clause. Apart from that clause there was to my mind no evidence as to any part of this property, that the admitted title being in the plaintiff the “possession or apparent possession” was in the vendor.

But next I will consider the interpretation clause, which is as follows:—“Personal chattels shall be deemed to be in the ‘apparent possession’ of the person making or giving the

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bill of sale, so long as they shall remain or be in or upon any house, mill, warehouse, building, works, yard, land, or other premises occupied by him." If the clause had stopped there it would have caused great difficulty as to the timber on the private wharf, though not as to that on the public wharf, and perhaps not as to the furniture, since the word "occupy," when applied to a dwelling-house, must, I think, mean "actually dwell," and cannot refer merely to such an occupation as would create a liability to parochial rates when, as in the present case, the house itself is actually occupied. But at the trial I certainly thought that the timber on the private wharf was upon premises still in the occupation of the vendor, and that as such it was in his "apparent possession." I am now satisfied that I was wrong. My error arose from not adverting to the latter words of the interpretation clause, "notwithstanding that *formal* possession thereof may have been taken by or given to any other person." I construe this clause to mean that the goods shall be deemed in the "apparent possession" of the vendor as long as they are on premises occupied by him, if nothing more has been done than the mere taking formal possession. But that where, as in the present case, far more than mere formal possession has been taken, the clause does not apply. I confess, however, that I think we are in effect differing from the opinion expressed by the Court of Common Pleas in Ireland in *Sheridan v. M'Cartney (a)*, who appear to me not to have adverted to the important words to which I have referred in the latter part of the interpretation clause. The ground of their judgment I understand to be that, although there was a perfectly bonâ fide sale, and the crops were as much taken possession of as growing crops could be, yet, as the occupation of the land remained in the seller, the case was within the interpreta-

(a) 11 Irish Com. Law Rep. 506.

tion clause, and the crops were in the "apparent possession" of the vendor, because they were on premises occupied by him. But in my opinion the language of the interpretation clause is qualified in the mode which I have pointed out, and only applies to cases in which formal possession has alone been given. I agree with the Lord Chief Baron that, in construing acts of parliament, we should endeavour to give them their true and natural construction; and even if we ought to extend a "liberal" construction to any act of parliament, I should not apply that term to the construction for which the defendant here contends. It must be borne in mind that informal documents like these agreements are not prepared by persons who are conversant with the provisions of such an Act as this. In *Sheridan v. M'Cartney* (a), the decision appears to have worked a hardship and an injustice, and, in the present case, if the Bills of Sale Act were held to apply, it would, assuming the verdict of the jury correct, have been a positive snare to two innocent persons. It is impossible that such a result can be in accordance with the intention of the legislature. I am, therefore, of opinion that giving the statute its strict and true construction, there was no evidence that any of these goods were in the "apparent possession" of the vendor, and that the plaintiff is entitled to judgment for the whole property.

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Rule discharged.

(a) 11 Irish Com. Law Rep. 506.



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By an arrangement between the defendant, an innkeeper, and her ostler, he had the profit of the stables, paying no rent, but providing hay, corn, &c., and supplying not only the guests in the inn but residents in the town, whose horses he was allowed to take care of. The plaintiff, who had no knowledge of this arrangement, arrived at the defendant's inn with his horse and gig, which were taken to the stable, and the plaintiff became a guest. He subsequently left, saying that he should not be back till the following Monday, and requested that his horse should be attended to. He did not return for a fortnight, and in the meantime the ostler

(for the purpose, as he said, of exercising the horse) drove it out, when it took fright at a locomotive steam-engine and was injured.—*Held*, that the relation of innkeeper and guest subsisted between the defendant and the plaintiff, and consequently the former was liable for the injury done to the horse.

ON appeal from the County Court of Lancashire, holden at Warrington, the following case was stated for the opinion of this Court:—

This action was brought to recover 50*l.* damages. The particulars annexed to the summons were specially framed, and contained several counts. First, for that the defendant, Mary Bather, an innkeeper, did not keep the horse and gig of the plaintiff, her guest, delivered to the defendant safely and without injury, but she and her servants so negligently conducted themselves that the plaintiff's horse was, on the 6th of July, 1862, thrown down and wounded, and became useless to the plaintiff, and his gig was broken, &c. Secondly, for that the defendant, as such innkeeper, and her servants, wrongfully pretending that the said horse required exercise, unlawfully, negligently and unskilfully drove the plaintiff's horse and gig on the said 6th July, 1862, along the public highway against certain steps, wall, palisading, &c.; whereby the horse was thrown down and wounded, and the gig broken. Thirdly, and for that the defendant, being a livery stable keeper, did not take due care of the plaintiff's said horse, delivered to her to be taken due care of for reward; but the defendant and her servants, on &c., negligently permitted the plaintiff's said horse to be damaged and become useless to the plaintiff. Fourthly, and for that the defendant, being such livery stable keeper as aforesaid, did not take due care of the plaintiff's said horse, delivered to

her to be taken care of for reward, but the defendant and her servant, on &c., wrongfully worked and used the said horse, and threw it down, and it became wounded &c. Fifthly, a count in trover.

On the trial it was proved, that at the time in question, the defendant was the keeper of an inn in Warrington; and that in consequence of some street improvements, the stables, which adjoined and were held with the inn, had been pulled down, and other stables belonging to the same landlord, but which were at some little distance and quite detached from the inn, were substituted for them, without any alteration in the rent. That the arrangement between the defendant and her ostler, William Rowles, was that he should make what he could out of the stables, he paying no rent for them, but providing hay and corn, &c., and supplying not only the guests in the inn but residents in the town whose horses he was allowed to take care of.

Rowles acted as ostler, went on errands when wanted, and occasionally got his dinner or other indulgences in the inn, but receiving no wages, and having no right to have his meals there at the defendant's expense, nor did he live on the premises. The defendant did not interfere in the management of the stables, but the plaintiff had no knowledge of any such arrangement between the defendant and her ostler, or that the latter was, as contended, a livery stable keeper on his own account.

In the month of June last the plaintiff arrived at the defendant's inn with his mare and gig, which were taken round, as usual at inns, to the stable yard, the plaintiff and his nephew going into the house as guests and using it as their inn.

When he left the defendant's inn the plaintiff said he should not be back till the following Monday, and requested that his mare might be properly attended to. The plaintiff

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did not return for about a fortnight, and in the meantime Rowles, without any order or permission from the defendant, put the mare into the gig and took her out for a drive with a friend one Sunday evening, and when passing along a road leading out of the town, the mare took fright at a locomotive engine passing under the road, became utterly unmanageable, galloped off and occasioned the injury complained of. When taken to task for putting the mare in harness, Rowles said that she wanted exercise, that she was very spirited and more than he could manage when on her back, and so he put her in the gig.

It was contended on behalf of the defendant, first, that under the foregoing circumstances, the relation of master and servant did not exist between the defendant and Rowles so as to make her responsible for his acts, the stables not being her stables, but his. Secondly, that the wrongful act, if any, being done without her sanction or permission, Rowles only was responsible. Thirdly, that inasmuch as exercise was necessary to the mare's health, it became the duty of the party in whose custody she was left to give her exercise. That Rowles, therefore, was justified in putting her in harness as the most convenient mode of giving her exercise; that what followed was purely an accident, which might have happened to the most careful driver, and that no one could be held responsible.

The Judge overruled all these objections, and gave a verdict for the plaintiff.

Hayes, Serjt., for the defendant. — The defendant is neither liable as an innkeeper, nor by reason of the relation of master and servant between herself and Rowles. First, the liability of an innkeeper and his guest are co-ordinate. An innkeeper is liable for loss or damage to goods belonging to a guest, because they are *infra hospitium*: *Cayle's*

Case (a). But here the plaintiff had ceased to be a guest, so that the horse was not *infra hospitium* (*b*). [*Martin, B.*—The plaintiff delivered his horse as a guest, and the defendant continued to keep it in his character of innkeeper.] Is a guest at liberty to leave his horse with an innkeeper for any length of time? If not, what is the limit,—is it a reasonable time? It cannot be that an innkeeper is liable for an indefinite period after the departure of his guest, and when there is no one to whom he can apply for payment. [*Pollock, C. B.*—When did the horse cease to be in the defendant's custody as innkeeper?] It is no part of the duty of an innkeeper to exercise his guest's horse, and if the guest by his neglect compels the innkeeper to do it, he is not responsible in his character of innkeeper. Secondly, the defendant is not responsible by reason of the relation of master and servant. As regards the stables, Bowles was not the servant of the defendant; and even assuming that he was, the driving the horse was not an act done in the course of his employment as servant, but for his own purposes. A master is not responsible for injury resulting from the negligence of his servant, unless the latter was at the time engaged in the discharge of his duty as servant: *Mitchell v. Crassweller* (*c*). Moreover, the act was not wrongful, but necessary in order to exercise the horse, and the injury was caused by mere accident, without any negligence.

George Browne appeared for the plaintiff, but was not called upon to argue.

(*a*) 8 Rep: 32 *a*.

(*b*) Sed vidè *Yorke v. Gre-naugh*, 2 Ld. Raym. 866; S. C. 1 Salk. 388, nom. *York v. Grind-stone*, where three Judges held, against the opinion of Lord *Holt*, that "if a man set his horse at an inn, though he lodge in another

place, that makes him a guest, and the innkeeper is obliged to receive him; for the innkeeper gains by the horse, and therefore that makes the owner a guest though he was absent."

(*c*) 13 C. B. 237.

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POLLOCK, C. B.—I am of opinion that our judgment ought to be for the respondent. The judge of the County Court overruled all the objections, and we must see whether he was right.

The first objection was, that the relation of master and servant did not exist between the defendant and Rowles, so as to make her responsible for his acts, the stables not being her stables, but his. But the plaintiff went to the defendant's inn, was there received as a guest, and his horse was taken in in the usual way, so that any private arrangement between the innkeeper and her ostler cannot be taken into consideration.

The second objection was, that the act complained of was done without the sanction or permission of the defendant. But the defendant being an innkeeper, and having received the horse in that character, is liable for the injury done to it whilst under her care. Whether the injury was done by the innkeeper or her servant, or a stranger, is immaterial, for unless a guest conducts himself in such a manner that the loss is occasioned by his negligence, the innkeeper is liable.

The third objection was, that the injury happened whilst giving the horse exercise which was necessary for its health. It may be that it was proper to exercise the horse, but the liability of the defendant as an innkeeper does not cease on that account.

MARTIN, B.—I am also of opinion that the respondent is entitled to recover. The argument for the appellant is founded on a fallacy, for if the injury had been done by a stranger, the defendant would have been equally responsible. The plaintiff's horse was received in the ordinary way at the defendant's inn, where he became a guest. He went away stating that he should not return until the following

Monday, and requested that the horse might be taken care of, but he did not return for a fortnight. It does not appear whether the accident occurred before that Monday or not, but we must infer that the relation of innkeeper and guest existed between the defendant and the plaintiff until something was done to indicate the contrary. The defendant's servant used the horse, and I will assume that it was not done improperly; still the defendant having contracted to take reasonable care of the horse, and having employed a person to look after it, who did not take reasonable care of it, is responsible for the injury.

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BRAMWELL, B.—I also think that the appeal should be decided in favour of the respondent, and on this ground, that before we can decide in favour of the appellant, we must be satisfied that the judge of the County Court was wrong. But I think he was warranted in overruling the objections. It is said, that as a matter of law, the relation of innkeeper and guest ceased to exist at the time of the accident. I do not assent to that. The judge might not have been wrong if he had found, as a matter of fact, that the appellant was not an innkeeper with reference to the respondent at that time, especially if this was the first time the respondent had been at the inn. But suppose that what occurred on this occasion had happened before, and that the respondent, after staying away for a longer time, had returned and paid for the horse, any objection that the relation of innkeeper and guest did not exist would be at an end. Upon the ground, therefore, that no fact is stated shewing that the judge is wrong in the conclusion he came to, there is no cause for reversing his judgment.

Appeal dismissed.

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April 23.

BLAKE v. THIRST.

The plaintiff received an injury by falling at night from the highway into an unfenced and unlighted sewer, which was being constructed under a written contract between the defendant and certain local Commissioners. A clause in the contract prohibited subletting without the engineer's consent. The defendant contracted by parol with N., a competent workman, to do the excavation, and brick-work, and the watching, lighting, and fencing, at an ascertained price per yard, while he supplied the bricks, and carted away the surplus earth. The defendant's

name was on the carts, and also on a temporary office near the works. He did not interfere during the progress of the work, but admitted that he should have dismissed N. if dissatisfied with the execution of the work. The clerk of the works was in the employment of the Commissioners.—*Held*, upon motion for a nonsuit, that there was evidence for the jury of the defendant's liability.

THE declaration stated that the defendant wrongfully, negligently and improperly made and dug a deep cutting or trench in the soil of a certain public highway, and kept and continued the same so made and dug during the night time without fixing or placing any proper or sufficient rail, fence, light or signal at or near such cutting or trench to denote or shew that the same was so made and dug as aforesaid, whereby the plaintiff, whilst lawfully passing along the said highway, fell and was precipitated into the hole or trench, and thereby suffered a concussion of the brain, &c.

Plea.—Not guilty.

At the trial before *Channell*, B., at the London Sittings in the present Term, the following facts appeared:—The action was brought for an injury sustained by the plaintiff, an infant, from falling into a sewer, which was being constructed in a public street in Surbiton. The accident occurred in the evening, after dark, at a part of the excavation, which was left unfenced and without light, and with no one to guard it. There were gas lights in the shops opposite, but, although the fact was contested at the trial, there was a preponderance of evidence to shew that the light from them was intercepted by a heap of earth thrown up in the process of excavating. The defendant, who was a contractor and builder, had undertaken to construct the sewer, by written contract with the Surbiton Improve-

ment Commissioners, who were acting under powers in a local Act. There was a wooden office near the site of the works over which the defendant's name was written, and where he kept a clerk, and his name was also upon the carts in which the surplus earth was carted away. The contract was produced at the trial, and contained a clause against subletting without consent, which appeared to be a usual clause in such contracts; and was as follows:—"The contractor shall not assign, underlet, or make a subcontract for the excavation of any portion of the work unless with the consent of the engineer."

The surveyor of the parish was examined as a witness for the plaintiff, and stated that he acted as the Commissioners' engineer of the works, and appointed a clerk of the works, who acted under him; and that the works were carried on under the superintendence of Neave, the defendant's foreman. On cross-examination he admitted that he had not seen the defendant at the works since they were in progress, and that he had never complained of any want of caution or skill in the execution of the work, but denied that he was aware of any contract between Neave and the defendant for executing it.

The defendant was called in support of his own case, and his evidence was corroborated by Neave. The substance of it was, that, shortly before the defendant's agreement with the Commissioners was signed, Neave, who was a bricklayer by trade, but understood excavation, and had frequently executed similar contracts, contracted with the defendant to do the whole excavation, and put in the brickwork, and to light, watch, and fence the excavation at a fixed price per yard. The evidence was contradictory as to who was to fill in when the brickwork was completed. The defendant was to supply the bricks and cart away the surplus earth. Neave, in fact, gave the order for the bricks,

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which were delivered at the works and paid for by the defendant. The workmen were employed by Neave who paid them by time, employing a time-keeper. The payments were made out of weekly advances received from the defendant on account of the work as it progressed. Neave employed two watchmen to patrol at night, and his directions were that lights should be put up as soon as the shops were closed. After the accident a light and some boards were put up by his orders at the spot where it occurred. The defendant stated that Neave was to have the entire superintendence of the work, but admitted that if it had not been to his satisfaction he should have dismissed Neave. The defendant was ill when the works were first in progress, and only visited them once or twice before the accident, and took no part in the work.

The learned Judge reserved to the defendant leave to move to enter a verdict for him, on the ground that there was no evidence to render him responsible; and left two questions to the jury.—First, whether there was any evidence of negligence in the management or execution of the works.—Secondly, whether the defendant had the control of the persons who had the management of the works. The jury answered both questions in the affirmative, and awarded to the plaintiff 20*l.* damages.

J. Brown now moved, pursuant to the leave reserved, to enter a nonsuit.—The defendant is not liable. The negligence was not his act. The relation of master and servant did not exist between the defendant and Neave, but that of contractor and subcontractor. No modification of the general rule can be deduced from the fact that the act which caused the injury amounted to a public nuisance. In *Overton v. Freeman* (a) it was contended that that circum-

(a) 11 C. B. 867.

stance created a distinction, but the Court held that the subcontractor alone was liable. [*Martin*, B.—In that case the act which caused the mischief did not form an essential ingredient in the subcontract. Here, on the other hand, it was done in immediate pursuance of the directions of the defendant.—He referred to *Ellis v. The Sheffield Gas Consumers' Company* (a).] The defendant contracted, no doubt, that the excavation should be dug, but at the same time he stipulated that it should be adequately lighted. The cause of complaint was the omission to put up the requisite lights. *Knight v. Fox* (b), and *Reedie v. The London and North Western Railway Company* (c), are the same effect as *Overton v. Freeman*. No distinction can arise from the clause in the contract with the Commissioners against subletting without the consent of the engineer. Even assuming no implied assent was given, the plaintiff, a stranger to the contract, could have no reason to complain, since Neave was as competent to execute the work as the defendant. [*Channell*, B.—The plaintiff might have reason to complain on the ground that Neave was not ostensibly the person responsible.] The real facts might have been ascertained on inquiry. [*Martin*, B.—Is it not clear that the relation of master and servant existed between the defendant and Neave? The defendant had control over Neave, who had the superintendence of the works.] In *Reedie v. The London and North Western Railway Company*, it was held that the circumstance that a railway company had reserved to themselves the power of dismissing the contractor's servants for incompetence, did not render the company responsible for their negligence. The injury here was the result, not of the work for which the defendant had contracted, but of the subcontractor's negligence in the mode

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(a) 2 E. & B. 767.

(b) 5 Exch. 721.

(c) 4 Exch. 244.

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of executing it. [*Pollock*, C. B.—The injury was, as it appears to me, caused by the thing contracted to be done, and the case of *Hole v. The Sittingbourne and Sheerness Railway Company* (a) shews that, when that is the case, it is no defence to an action against the employer, that the person whom he employed contracted that it should not be done imperfectly. My brother *Wilde* there says:—"The distinction appears to me to be that, when work is being done under a contract, if an accident happens, and an injury is caused by negligence in a matter entirely collateral to the contract, the liability turns on the question whether the relation of master and servant exists. But when the thing contracted to be done causes the mischief, and the injury can only be said to arise from the authority of the employer, because the thing contracted to be done is imperfectly performed, there the employer must be taken to have authorized the act and is responsible for it."] That case introduced a new and subtle distinction at variance with the simple rule which had been established by all the antecedent authorities.

POLLOCK, C. B.—I am of opinion that there should in this case be no rule. The act which caused the mischief was done by the order and under the immediate directions of the defendant, and his contract with Neave affords in my opinion no answer to his responsibility.

MARTIN, B.—The view which I take of this case does not rest upon the authority of *Hole v. The Sittingbourne and Sheerness Railway Company* (a). I think the relation of master and servant clearly existed between the defendant and Neave within the principle established by the more recent decisions.

(a) 6 H. & N. 488.

BRAMWELL, B.—I agree that there should be no rule. The evidence, I think, shewed that the defendant had a right to control the way in which the work was to be executed. Suppose the defendant had made two contracts with different persons; with one, that he should dig the excavation; with the other, that he should light and watch it. It could not, I apprehend, be then contended that he would not be himself responsible. I think he is no less responsible here, though there is but one contract with a single individual.

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Rule refused.

MOULTON, Appellant, and WILBY, Respondent.

April 20. 22.

CASE stated under the 20 & 21 Vict. c. 43, s. 2, as follows:—

R. Moulton, T. Barnett, and G. Dobson, upon the complaint of J. Wilby, were duly summoned to appear on the 25th July last before us two justices of the peace for the city and borough of Chester: for that the said R. Moulton, T. Barnett and G. Dobson did, on the 26th day of May last, catch in the salmon cage, on the river Dee, in the city of Chester, and within fifty yards below a dam there existing, six salmon otherwise than by rod and line, contrary to the provisions of the 12th section of the 24 & 25 Vict. c. 109.

Upon hearing the complaint the before mentioned parties appeared before us, and it was proved that, on the 26th day of May last, the defendants took, by means of a landing net, six salmon out of the salmon cage in which the fish were then impounded.

The 12th section of "The Salmon Fishery Act, 1861" (24 & 25 Vict. c. 109), absolutely prohibits the catching or attempting to catch, except by rod and line, any salmon within fifty yards below any dam, unless it has attached to it a fish-pass, notwithstanding any ancient right by charter, grant, or immemorial usage of fishing in a salmon cage.

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The salmon cage was within fifty yards below a fishing mill dam, such as is mentioned in section 4 of the said Act, on the River Dee.

The fishing mill dam had not a fish-pass attached thereto in accordance with the 12th section of the 24 & 25 Vict. c. 109.

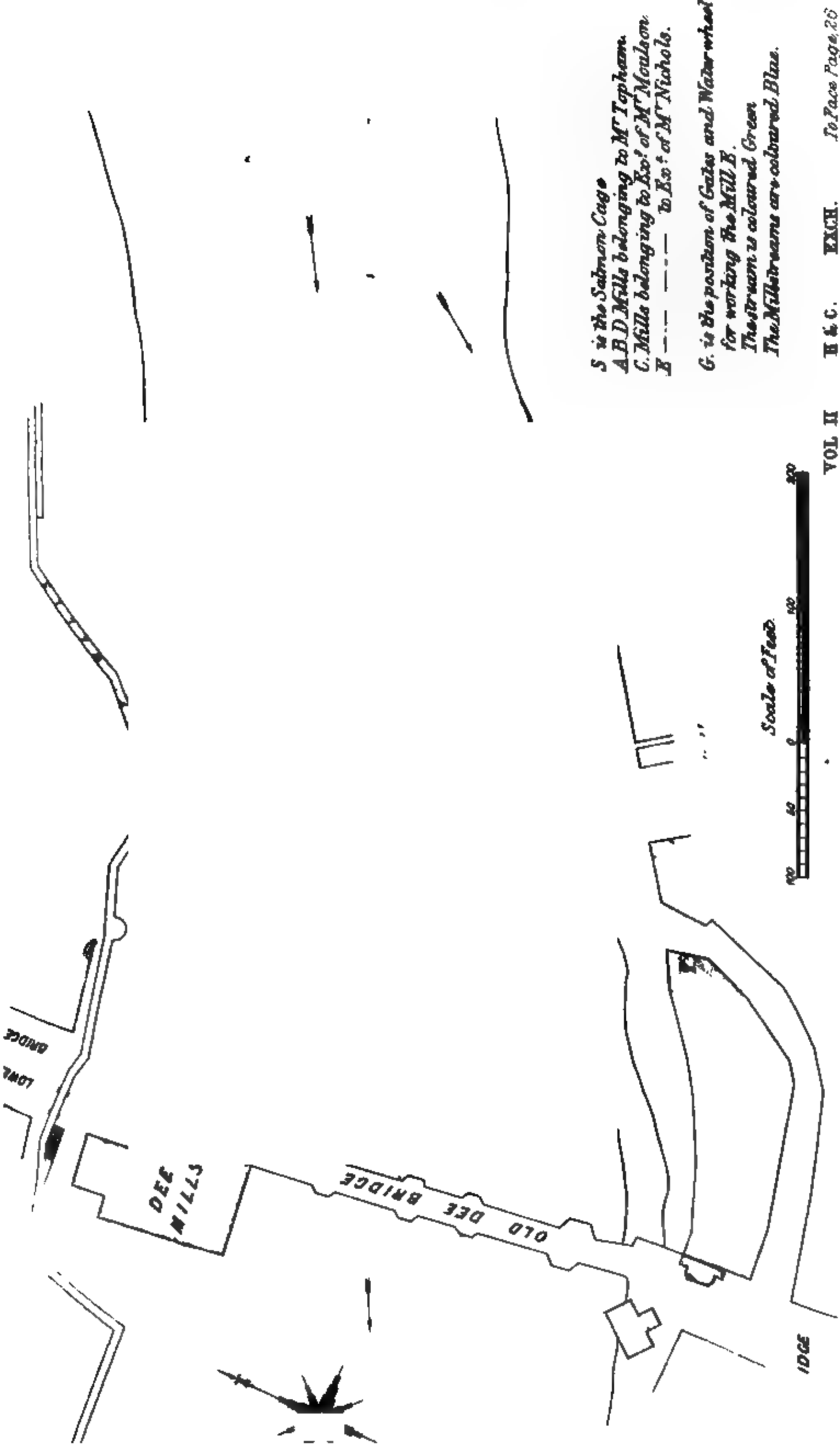
The mode in which the salmon were taken was similar to that in use before the passing of the last mentioned Act.

Since the passing of the said Act, bars had been placed in the salmon cage, which bars, when up, constituted a clear opening for salmon to pass through the cage, both up and down, according to the provisions of the 22nd section of the said Act. The bars were up on the 26th day of May.

For the defence it appeared to our satisfaction, and it was admitted, on the part of the complainant, that there was an ancient right of fishing in the aforesaid salmon cage by charter, grant, or immemorial usage, which right had been purchased many years ago by one Topham, from whom it descended to the present owner Robert Topham, whose tenant the defendant Moulton was before and on the 26th day of May, and under which charter, grant, or immemorial usage the said defendant and previous tenants of Topham had lawfully fished, and been used to fish, before and until and at the time of the passing of the said Act.

It was not disputed that the defendant Moulton was Topham's tenant, and as such tenant was licensed by Topham (if Topham had the power to give such license by law) to do the act complained of.

Upon the above facts we were of opinion that the matter of the said complaint had been proved against the defendant Moulton, but not against the defendants Barnett and Dob-



*S is the Salmon Cage
 A B D Mills belonging to Mr Topham.
 C Mills belonging to Esq of Mr Moulton.
 E --- to Esq of Mr Nichols.*

*G is the position of Gates and Water wheel
 for working the Mill E.
 The stream is coloured Green
 The Milldams are coloured Blue.*

son, and we dismissed the summons as against the said Barnett and Dobson, and convicted the said Moulton of an offence against the 12th section of the said Act of 1861, and adjudged him to pay a penalty of 5s. for his said offence, and also adjudged him to pay 1s. for each salmon so as aforesaid taken.

Annexed to the case was the accompanying plan, shewing the locality of the salmon cage and mill-dam referred to.


M Intyre argued for the respondent (April 21).— By the 11th section (a) of the “ Salmon Fishery Act, 1861” (24 & 25 Vict. c. 109), “ no fixed engine of any description shall be placed or used for catching salmon in any inland or tidal waters,” &c., “ but this section shall not affect any ancient right or mode of fishing as lawfully exercised at the time of the passing of this Act by any person by virtue of any grant, or charter, or immemorial usage; provided always that nothing in this section contained shall be deemed to apply to fishing weirs or fishing mill-dams.” By section 12 (b),

(a) Sect. 11.—“ No fixed engine of any description shall be placed or used for catching salmon in any inland or tidal water; and any engine placed or used in contravention of this section may be taken possession of or destroyed; and any engine so placed or used, and any salmon taken by such engine, shall be forfeited, and, in addition thereto, the owner of any engine placed or used in contravention of this section shall, for each day of so placing or using the same, incur a penalty not exceeding 10*l*.; and for the purposes of this section a net that is secured by anchors, or otherwise temporarily fixed to the soil, shall be deemed to be a fixed engine,

but this section shall not affect any ancient right or mode of fishing as lawfully exercised at the time of the passing of this Act by any person by virtue of any grant or charter or immemorial usage; provided always, that nothing in this section contained shall be deemed to apply to fishing weirs or fishing mill dams.”

(b) Sect. 12.—“ The following regulations shall be observed with respect to dams:

(1.) No dam except such fishing weirs and fishing mill dams as are lawfully in use at the time of the passing of this Act, by virtue of a grant or charter or immemorial usage, shall be used for the purpose of catching

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"no dam except such fishing weirs and fishing mill-dams as are lawfully in use at the time of the passing of this Act, by virtue of a grant or charter, or immemorial usage, shall be used for the purpose of catching or facilitating the catching of salmon," &c. "And no fishing mill-dam, although lawfully in use as aforesaid, shall be used for the purpose of catching salmon, unless it have attached thereto a fish-pass of such form and dimensions as shall be approved of by the Home Office, nor unless such fish-pass has constantly running

or facilitating the catching of salmon :

1. Any person catching or attempting to catch salmon in contravention of this section shall incur a penalty not exceeding 5*l.* for each offence, and a further penalty not exceeding 1*l.* for each salmon which he catches :

2. All traps, nets, and contrivances used in or in connection with the dam for the purpose of catching salmon shall be forfeited :

3. All salmon caught in contravention of the above prohibition shall be forfeited :

And no fishing weir, although lawfully in use as aforesaid, shall be used for the purposes of catching salmon unless it have therein such free gap as is hereinafter mentioned ; and no fishing mill dam, although lawfully in use as aforesaid, shall be used for the purposes of catching salmon unless it have attached thereto a fish pass of such form and dimensions as shall be approved of by the Home Office, nor unless such fish pass has constantly running

through it such a flow of water as will enable salmon to pass up and down such pass, but so nevertheless that such pass shall not be larger nor deeper than requisite for the above purposes :

(2.) No person shall catch or attempt to catch, except by rod and line, any salmon in the head race or tail race of any mill, or within fifty yards below any dam, unless such mill or dam has attached thereto a fish-pass of such form and dimensions as may be approved by the Home Office, and such fish-pass has constantly running through it such a flow of water as will enable salmon to pass up and down it ; and if any person acts in contravention of the foregoing provision :


1. He shall incur a penalty not exceeding 2*l.* for each offence, and a further penalty not exceeding 1*l.* for every salmon so caught :

2. He shall forfeit all salmon caught in contravention of this section, and all nets or other instruments used or placed for catching the same."

through it such a flow of water as will enable salmon to pass up and down such pass," &c. "and no person shall catch or attempt to catch, except by rod and line, any salmon in the head-race or tail-race of any mill, or within fifty yards below any dam, unless such mill or dam has attached thereto a fish-pass of such form and dimensions as may be approved by the Home Office, and such fish-pass has constantly running through it such a flow of water as will enable salmon to pass up and down it." The fact that there was an ancient right of fishing in the salmon cage, does not bring the case within the exception contained in the 11th section, for as no fish-pass was attached to the mill-dam, as required by the 12th section, the catching salmon, except by rod and line, within fifty yards below the dam, is absolutely prohibited.

The Court then called on

Beavan, for the appellant.—The case falls within the exemption contained in the 11th section. The "cage" is no part of a "fishing weir," or a "fishing mill-dam," but a "fixed engine," by means of which an "ancient right or mode of fishing was lawfully exercised at the time of the passing of the Act." The mill-dam commences at the mill and terminates at the letter A. on the plan. Section 12 only prescribes regulations "with respect to dams"; and by the interpretation clause (sect. 4), "dam" means "all weirs and other fixed obstructions used for the purpose of damming up water." Therefore, this cage is not within the provisions of the first portion of the 12th section. It is not within the second portion of that section, because it relates to fishing within fifty yards below any dam, with nets or other instruments, which may be taken possession of. That cannot apply to a cage, which is affixed to the freehold. Again, the 21st section, which prohibits the fishing, except by rod and line, between certain hours on Saturday

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and Monday, applies to fishing with nets or moveable instruments. The case finds that the requisitions of the 22nd section have been complied with.

M'Intyre, in reply.—The 11th section relates to “fixed engines,” which, if placed or used in contravention of that section, may be taken possession of and destroyed. This “cage” is part of the fishing mill-dam, and fishing weirs and fishing mill-dams are expressly excepted from the reservation of ancient rights in the 11th section. [*Martin*, B. —I doubt whether the weir as shewn on the plan is a fishing mill-dam.] Under the second portion of the 12th section, it is immaterial whether the fish are caught by a fixed engine or a fishing weir or dam, for the catching them within fifty yards below any dam is absolutely prohibited, unless it has a fish-pass attached to it.

POLLOCK, C. B.—We are all of opinion that the conviction was right. The 11th section has really no bearing on this case. That section prohibits the placing or using fixed engines of any description for catching salmon, but provides that it “shall not affect any ancient right or mode of fishing as lawfully exercised at the time of the passing of the Act by any person by virtue of any grant, charter, or immemorial usage.” No doubt, the present mode of fishing in a salmon-cage is sanctioned by immemorial usage, but the 12th section expressly says that, “no person shall catch or attempt to catch, except by rod and line, any salmon in the head-race or tail-race of any mill, or within fifty yards below any dam, unless such mill or dam has attached thereto a fish-pass.” This weir or dam had no fish-pass, and therefore, the using the “cage” for the purpose of catching fish was an offence for which the party incurred a penalty under that section.

For these reasons, I think that the conviction ought to be affirmed.

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MARTIN, B.—I am of the same opinion. Although at one time I entertained some doubt, I am now satisfied that, according to the true construction of this part of the 12th section, it is an absolute prohibition against catching or attempting to catch, except by rod and line, any salmon within fifty yards below a dam, unless a fish-pass is attached to it. Then the 23rd and 24th sections enable any proprietor of a fishery, who may be a distinct person from the owner of the dam, with the written consent of the Home Office, to attach a fish-pass to any dam adversely to the owner. Therefore it seems to me that the conviction was right.

BRAMWELL, B.—I am of the same opinion. The exemption contained in the 11th section has no bearing on this question. It means that nothing in that section shall affect any ancient right of fishing by any fixed engine, provided it is not a fishing weir or fishing mill-dam. The 12th section begins thus: "The following regulations shall be observed with respect to dams." The first is a prohibition against using any dam for catching salmon, except such fishing weirs and fishing mill-dams as were used, at the time of the passing of the Act, by virtue of a grant or charter or immemorial usage. The section proceeds to say that "no fishing weir, although lawfully in use as aforesaid, shall be used for the purpose of catching salmon unless it have therein such free gap as is hereinafter mentioned; and no fishing mill-dam, although lawfully in use as aforesaid, shall be used for the purpose of catching salmon unless it have attached thereto a fish-pass." Now this weir or mill-dam had not a fish-pass attached to it. My brother *Martin* has expressed a doubt whether the weir is a fishing mill-dam.

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My notion is, that if a person uses it for the purpose of catching fish, he avails himself of it as a fishing mill-dam, although it does not belong to him; for if no weir was there the cage would be of no use, since the cage has only the effect of a cage by reason of the weir being there to stop the fish from going in any other direction. The case might not have been within the Act if the weir had been placed some fifty yards lower down the river. No doubt there is difficulty in giving this construction to the Act, for possibly the weir might belong to a person who was not the owner of the fishery, and the latter would therefore be deprived of his right, or, at least, compelled to pay a consideration to preserve it. On the other hand it is manifest that, if a fish-pass is attached to a mill-dam, the efficacy of the dam for confining the water for the mill is diminished. However Mr. *M'Intyre* has convinced me that a person cannot fish with a net within fifty yards below any dam, unless a fish-pass is attached to it, although he may have had an ancient right of fishing there. It seems to me that, instead of that enactment being a hardship, it will prove beneficial to the persons whose rights are restrained.

WILDE, B.—I am of the same opinion. The appellant is in this dilemma.—If this “cage” is a portion of a dam used for fishing, it falls within the first provision of the 12th section, because it is a fishing mill-dam which has no fish-pass attached to it; but, if the “cage” is not a portion of a dam, the case falls within the second branch of the regulations in the 12th section, which says that no person shall catch or attempt to catch, except by rod and line, any salmon within fifty yards below any dam, unless it has a fish-pass attached to it. It seems to me that the case is plain, and that the conviction ought to be affirmed.

Determination of justices affirmed.

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DECLARATION.—For that the defendant seized, cut to pieces and destroyed the plaintiff's fishing nets and poles, and converted the same to the defendant's own use, and wrongfully deprived the plaintiff of the use and possession thereof.

Plea.—That before and at the time of the alleged grievances in the declaration complained of, the plaintiff had placed, and had been and was using, in a certain tidal water, to wit, the river Conway, certain fixed engines for catching salmon in contravention of the provisions of "The Salmon Fishery Act, 1861"; and that the fishing nets and poles mentioned in the declaration are the said fixed engines so placed and used by the plaintiff in the river Conway as aforesaid. And the defendant says that he took possession of and destroyed the said fishing nets and poles by order and under the direction of one Edmund Sharp, as and then being the conservator of the said river, duly appointed in that behalf, as he lawfully might, under the provisions of the said act of parliament, for the cause aforesaid, which are the grounds complained of.

Replication.—That the said Edmund Sharp was appointed by the justices of the peace in and for the county of Denbigh, assembled at the general or quarter sessions of the peace in and for the said county, conservator or overseer for the preservation of salmon, and for enforcing for that purpose the provisions of the said Act within the limits of the jurisdiction of such justices, and was not otherwise the conservator of the said river, which was partly in and bounded by the said county of Denbigh, but the place

Under the 11th section of "The Salmon Fishing Act, 1861," the right to take possession of or destroy any engine placed or used for catching salmon in contravention of that section, extends to all persons, and is not limited to conservators or overseers appointed under the 33rd section.

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where the said trespasses and grievances were committed, and where the said fishing nets and poles were placed and fixed and used, was without the said county of Denbigh, to wit, in the county of Carnarvon, and not within the limits of the jurisdiction of the said justices.

Demurrer, and joinder thereon.


Welsby (*J. H. Lloyd* with him), for the defendant.—First, the allegation in the plea that the defendant destroyed the fishing nets and poles by order and under the direction of the conservator of the river, is wholly unnecessary, for inasmuch as the nets and poles were used for catching salmon in contravention of “The Salmon Fishery Act, 1861)” (24 & 25 Vict. c. 109), any person might destroy them. By the 11th section (*a*) of that Act, “no fixed engine of any description shall be placed or used for catching salmon in any inland or tidal waters, and any engine placed or used in contravention of this section may be taken possession of or destroyed.” The 33rd section (*b*) enables justices of the peace to appoint conservators for the preservation of salmon, and enforcing for that purpose the provisions of the Act; but that does not limit the general power conferred by the 11th section. It is not incumbent on the justices to appoint a conservator: the 33rd section is merely a cumulative provision enabling them to do so, if they think fit. Secondly, it is consistent with all that appears on the record, that the conservator had authority to destroy the nets and poles. It was his duty to enforce the provisions of the Act for the preservation of salmon within the limits of the jurisdiction of the justices who appointed him; and for

(*a*) *Ante*, p. 27, note (*a*).

(*b*) Section 33.—“It shall be lawful for the justices of the peace assembled at any general or quarter sessions of the peace from time to time to appoint

conservators or overseers for the preservation of salmon, and enforcing for that purpose the provisions of this Act within the limits of the jurisdiction of such justices.

that purpose he was justified in destroying nets and poles wherever they were placed in contravention of the Act.

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Aspland, for the plaintiff.—The Act does not authorize every person to seize and destroy fixed engines placed in contravention of it. The 11th section must be read in connection with the 33rd. It would afford temptation for the wanton destruction of property if every person had a right to destroy whatever he considered a nuisance. An individual cannot abate a nuisance if he is not otherwise injured by it than as one of the public: *The Mayor &c. of Colchester v. Brooke* (a). A common informer cannot sue for a penalty, unless the legislature has authorized any person to sue. [*Pollock*, C. B.—Where a river is partly in one county and partly in another, how are the inhabitants of one county to preserve their salmon, when fixed engines are placed in the other county, unless they have the power of removing them?] The remedy is by indictment. [*Martin*, B., referred to the 36th section (b). *Bramwell*, B.—There seems no provision for paying a conservator; and suppose no one is appointed?] The offender might be prosecuted under the 36th section. Moreover, the defendant justifies under his authority as a conservator; and when that is displaced by the facts stated in the replication, he cannot rely on a general authority as one of the public, for that would be a departure. [*Pollock*, C. B.—The defendant, being a conservator, would have a right to destroy the nets either by virtue of his office or as one of the public.]

Welsby was not called upon to reply.

(a) 7 Q. B. 339.

(b) Section 36.—“Where any offence under this Act is committed in or upon any waters forming the boundary between any two counties, districts of

quarter sessions or petty sessions, such offence may be prosecuted before any justice or justices of the peace in either of such counties or districts.”

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POLLOCK, C. B.—We are all of opinion that the defendant was justified in what he did.

MARTIN, B., and BRAMWELL, B., concurred.

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MILLS v. BAYLEY.

By agreement in writing between the plaintiff and defendant, the plaintiff agreed to take the emptying of defendant's mill-pool upon the terms that the defendant should pay the plaintiff 5*d.* for every cubic yard of mud taken out of the pool; that the admeasurement of the mud removed be settled by N.; and that, if any dispute arose, it should be referred to N. to be by him decided. The plaintiff alleged that the defendant prevented him from completing the work by

flooding the pool, and the matter was referred to N., who awarded to the plaintiff a certain sum in respect of the quantity of mud then removed, and another sum in respect of damage occasioned to the plaintiff by defendant flooding the pool. In an action on the award, the defendant pleaded that before it was made he revoked the arbitrator's authority:—*Held*, on demurrer, that the plea was good, since the agreement to refer consisted of two distinct parts, viz., the admeasurement of the mud and the settlement of disputes, and that the latter part was revocable although the former was not.

DECLARATION.—For that whereas by an agreement in writing, dated the 9th March, 1861, and made between the plaintiff of the one part and the defendant of the other part, the plaintiff agreed to take the emptying of the mill-pool in the occupation of the defendant upon the following terms, viz., that the defendant was to pay the plaintiff for every cubic yard of mud taken out of the pool the sum of 5*d.*; such mud to be laid upon the sides of the pool in as little space as possible, the whole to be cleaned out as soon as possible, and to be done in a proper and workman-like manner; that the admeasurement of the mud removed should be settled by one T. Neville, surveyor, and that, if any dispute arose, the said dispute should be referred to the said T. Neville, to be by him decided. And whereas it was afterwards alleged by the plaintiff, that previously to the committal by the defendant of the grievance next hereinafter mentioned, he, the plaintiff, pursuant to the said agreement, proceeded to the emptying of the said pool, and in manner in the said agreement mentioned removed a quantity of mud therefrom, and laid the same upon the

sides of the said pool in as little space as possible, and that, up to the time of the committal of said grievance, he the plaintiff did all things which by the terms of the said agreement he ought to have done, and in manner therein provided. And further, that whilst the plaintiff was, in further pursuance of the said agreement and in manner therein provided, proceeding with the emptying of the pool and the removal and laying of the remainder of the mud therein contained, the defendant wrongfully caused a great body of water to flow into the pool and continue therein, whereby the plaintiff was wholly hindered from completing his said agreement with the defendant, and lost the gains and profits that would have accrued to him, and, a dispute having arisen between the defendant and the plaintiff touching the aforesaid allegations of the plaintiff, he the plaintiff required the said T. Neville, pursuant to the said agreement, to determine the truth of such allegations; and if he the said T. Neville should find them proved, to determine further the admeasurement of the mud alleged to have been removed and laid as aforesaid, and the damage sustained by the plaintiff by reason of the committal by the defendant of such grievance as hereinafter mentioned.—
Averment: that the said T. Neville having taken upon himself the burthen of the said reference as by the said agreement provided, and after notice to the parties, having duly weighed and considered the several allegations of the parties and the proofs, vouchers and documents which had been given in evidence before him by the parties, and having inspected and measured the said pool and the mud alleged to have been gotten thereout as aforesaid, did duly make and publish his award in writing under his hand of and concerning the matters referred to him in manner following, that is to say, he did thereby award and adjudge that before the committal by the defendant of the grievance

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thereinbefore and thereafter mentioned, the plaintiff, pursuant to the said agreement, proceeded to the emptying of the said pool in the said agreement mentioned, and in manner therein provided got out of the said pool and laid upon the sides thereof a large quantity of mud, and that up to the time of the committal of the said grievance the plaintiff did all things which, by the terms of the said agreement, he ought to have done, and in manner by the said agreement provided, and he the said T. Neville did award and adjudge that in respect of the mud so gotten and laid as hereinbefore mentioned, the defendant should pay to the plaintiff the sum of 8*l.* 6*s.* 8*d.* And he did further award and adjudge that whilst the plaintiff was, in further pursuance of the said agreement and in manner therein provided, proceeding further to empty the pool and to get mud thereout, and lay the same on the banks thereof, and notwithstanding that the plaintiff had done and was doing all things which, by the terms of the said agreement, he ought to have done and be doing, the defendant wrongfully caused a great body of water to flow into the pool and continue there, by means whereof the plaintiff was wholly hindered from continuing to remove and lay mud thereon as aforesaid, and from completing his said agreement with the defendant, and lost the gains and profits that would have thereby accrued to him. And the said T. Neville did award and adjudge that, in respect of the damages so occasioned to the plaintiff by the defendant as aforesaid, the defendant should pay to the plaintiff the sum of 10*l.* 2*s.* 1*d.*—Averment of performance of conditions precedent, and that all things happened necessary to entitle the plaintiff to be paid by the defendant the said sums of 8*l.* 6*s.* 8*d.* and 10*l.* 2*s.* 1*d.*—Breach: nonpayment.

Fourth plea.—That, before the making of the said alleged award, the defendant revoked the said submission and refer-

ence to arbitration and the authority of the said T. Neville as such arbitrator, and then gave the said T. Neville notice of such revocation.

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Gray, in support of the demurrer.—First, it was not competent to the defendant to revoke the submission, because the admeasurement by the arbitrator of the mud removed is part of the consideration for which the plaintiff undertook to do the work. The plaintiff could not recover the agreed price for the mud removed until its admeasurement was determined by the arbitrator: *Brown v. Overbury* (a). [*Martin*, B.—The principle of that decision is that, in the case of a horse race, the stewards are expressly appointed to determine the matter; and therefore that horse is the winner which in their judgment comes in first.] In this case no action would lie until the damages were ascertained by the award of the arbitrator: *Scott v. Avery* (b); *Scott v. The Corporation of Liverpool* (c); *Marryatt v. Broderick* (d).—Secondly, the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), has rendered this submission irrevocable. By the 3 & 4 Wm. 4, c. 42, s. 39, a submission to reference containing an agreement that such submission shall be made a rule of Court is not revocable without the leave of the Court. Then, by the 17th section of the Common Law Procedure Act, 1854, “every agreement or submission to arbitration by consent, whether by deed or instrument in writing not under seal, may be made a rule of any one of the superior Courts of law or equity at Westminster, on the application of any party thereto, unless such agreement or submission contain words purporting that the parties intend that it should not be made a rule of Court.”

(a) 11 Exch. 715.

(c) 3 De Gex & J. 334.

(b) 5 H. L. 811.

(d) 2 M. & W. 369.

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This agreement contains no provision that it shall not be made a rule of Court: and the effect of the 17th section of the Common Law Procedure Act, 1854, is to insert in the agreement a clause empowering it to be made a rule of Court.

W. R. Cole, in support of the plea.—The agreement that the admeasurement of the mud removed shall be settled by an arbitrator is separate and distinct from the agreement that, if any dispute arises, it shall be decided by him, and although the former part of the agreement may not be revocable, the latter is. A mere certificate as to the admeasurement of the mud, would not have been an award: *Leeds v. Burrows* (a); *Perkins v. Potts* (b); *Northampton Gas Light Company v. Parnell* (c). But this action is brought for not performing the award, the plaintiff treating it as an entire award made in pursuance of the submission. The defendant answers, that before the award was made he revoked the submission. The question therefore resolves itself into the construction of the 17th section of the Common Law Procedure Act, 1854. The 9 & 10 Wm. 3, c. 15, enabled parties to insert in their submission an agreement that it should be made a rule of Court, but at common law a submission might be revoked, whether made a rule of Court or not: *Green v. Pole* (d); *Milne v. Gratrex* (e); *King v. Joseph* (f). The 3 & 4 Wm. 4, c. 42, s. 39, prohibits a revocation without leave of the Court where the submission contains an express stipulation that it shall be made a rule of Court; Russell on Arbitration, p. 154, 2nd ed. The 17th section of the Common Law Procedure Act, 1854, merely provides that every submission may be made a rule of Court unless there is a statement to the contrary:

(a) 12 East, 1.

(b) 2 Chit. 399.

(c) 15 C. B. 630.

(d) 6 Bing. 443.

(e) 7 East, 608.

(f) 5 Taunt. 452.

but it does not say that the submission shall not be revocable. Therefore that statute in effect does no more than the 9 & 10 Wm. 3, c. 15.—He was then stopped by the Court.

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Gray replied.

POLLOCK, C. B.—I am of opinion that the defendant is entitled to judgment. Where there is a reference to a particular individual to ascertain the quantity of work done and the amount due, as, for instance, where the parties to a building contract stipulate that an architect shall certify whether the work has been done, and the price to be paid for it, neither party can revoke his authority. But, here, there are in fact two references, one as to the quantity of mud removed, which, if it had stood alone would have been irrevocable except by consent of both parties; the other as to the settlement of disputes, which might be, and was revoked.

MARTIN, B.—I am of the same opinion, but I regret that the law is so, and that the legislature, when they were dealing with the subject of arbitration, did not in all cases prohibit the revocation of references. If this agreement had been simply that Neville should measure and ascertain the quantity of mud removed by the plaintiff, there would have been no difficulty, because he would not, strictly speaking, have been an arbitrator, and the authority conferred on him would have been irrevocable. But, with respect to the other part, I can see no distinction between that and an ordinary reference of matters in dispute, which is revocable. If Neville had simply confined himself to certifying how many cubic yards of mud had been removed, I think there might have been a good declaration to which this plea would have been no answer. But the plaintiff has declared on an

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award, making him an arbitrator, and the plea alleges that his authority was revoked before he made the award. I, therefore think that our judgment ought to be for the defendant.

BRAMWELL, B.—I am of the same opinion. It is clear that the two clauses are separate and relate to different subjects. The plaintiff was to be paid 5*d.* for every cubic yard of mud removed; the admeasurement of the mud removed to be settled by Neville, and if any dispute arose that was to be decided by him. In fact, Neville filled two distinct characters; one, the measurer and certifier of the mud removed; the other, that of an arbitrator for the settlement of any disputes which might arise between the parties. In the former character his authority was irrevocable; in the latter it was revoked.

Judgment for the defendant.

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BATTERBURY v. VYSE.

A declaration alleged that the plaintiff agreed to do certain specified works for the defendant, upon the terms and conditions (amongst others) that the works

were to be executed to the satisfaction of the defendant and his architect, "but no payment was to be considered due unless upon production of the architect's certificate." The declaration averred performance by the plaintiff of all things necessary to entitle him to the certificate, and that he had completed the works to the satisfaction of the architect; and alleged as a breach that the architect unfairly and improperly neglected to certify, and "*so neglected in collusion with the defendant and by his procurement,*" whereby the plaintiff was unable to obtain payment.—*Held*, on demurrer, that the declaration disclosed a good cause of action, inasmuch as it imputed fraud in withholding the certificate.

DECLARATION.—For that heretofore, to wit, on &c., the plaintiff and the defendant agreed that the defendant should employ the plaintiff to do and provide for him, and that the plaintiff should do for the defendant certain specified works, and provide for the defendant certain specified materials, at No. 125, Oxford Street, upon the

following terms and conditions, that is to say: "All the words hereinbefore described (meaning the description contained in a certain specification of the said works) are to be executed in the very best and most workmanlike manner, with the very best quality of materials of every description, under the superintendence and to the satisfaction of Mr. Vyse and his architect. The works described are intended to embrace everything that may be necessary for the perfect completion of the several alterations. If, therefore, through any error or inadvertence, any matter or thing which may be deemed by the architect as essential to this end be omitted, it is to be supplied and performed by the contractor in like manner as if it had been particularly specified; and if in the course of the work it should be found necessary to make any addition to or omission from the said works, such deviation is not in any way to vitiate the contract, but the value of such works shall be estimated by the architect, and the value thereof added to or deducted from the contract sum as the case may be, the decision of the architect being final and conclusive in all matters affecting the proposed works. The amount of the contract will be paid by instalments equal to the value of 80% per cent. of the value of the works executed, the balance within one month after final completion to the architect's satisfaction, but no payment will be considered due unless upon production of the architect's certificate." (Then followed an agreement by the defendant to execute the works for 610%.) —Averments: that pursuant to the contract the plaintiff did the specified works and provided the materials, with the exception of certain omissions which were duly required by the defendant and his architect; and that he also did divers and very many additional works which were duly required to be done by the defendant and his architect; and that the value of the said works and materials amounted to a

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large sum, to wit 1000*l.*, whereof the defendant had due notice; and although the defendant paid to the plaintiff 600*l.* on account of the said works, leaving a large balance, to wit, 400*l.*, of the fair and reasonable value of the said works, estimated according to the said contract, unpaid; and although the plaintiff had done all things necessary on his part to entitle him to have the value of the said extras and omissions estimated by the said architect, and to entitle him to the said architect's certificate for payment; and although he had completed the said works to the satisfaction of the defendant's architect; and although more than a month from such time had elapsed; and although the defendant and his architect had, at all times since the doing of the said works and the providing of the said materials, had full knowledge that the plaintiff was entitled to be paid by the defendant a large sum of money over and above the money so paid, and although a reasonable time for the said architect to estimate the value of the said additions and omissions, and to certify as aforesaid, and for the defendant to pay for the said works, had long since elapsed, yet the architect had not estimated the value of the said additions and omissions, nor had he certified as aforesaid, but wholly neglected so to do, and had unfairly, improperly and contrary to the true intent and meaning of the said contract, neglected to estimate the value of the said additions and omissions, and neglected to certify as aforesaid, *and had so neglected in collusion with the defendant and by his procurement.* By means of which premises the plaintiff has been unable to obtain payment of the balance justly due to him for the said works, and the said balance still remains wholly due and unpaid to the plaintiff.

Demurrer, and joinder therein.

Gates, in support of the demurrer.—The declaration is

bad. The production of the architect's certificate is a condition precedent to the plaintiff's right to claim any payment. [*Martin*, B.—This is, in substance, a declaration in case, alleging that the defendant, acting in collusion with the architect, procured him unfairly and improperly to withhold his certificate.] Treated as an action of contract, the plaintiff cannot recover, because he has not complied with the condition which entitled him to payment; and it is not an action on the case, because it does not charge fraud, or allege any duty on the part of the defendant which he has neglected to perform. However unreasonable and oppressive a stipulation or condition may be, a Court of law is bound to give effect to the terms agreed upon between the parties: *Stadhard v. Lee* (a). [*Bramwell*, B.—That case does not touch this. Here the complaint is not that something has been done, and done wrongly, but that there has been an improper refusal to do that which ought to have been done.] The opinion of *Erle*, J., in *Scott v. The Corporation of Liverpool* (b), is an express authority that, in the absence of fraud, the withholding the certificate by the architect affords no right of action against the defendant, either on the ground of a waiver of the condition, or the substitution of a new contract, or on the ground of a wrong. This is an attempt to obtain indirectly that which the plaintiff is not entitled to by the terms of his contract. If, indeed, the certificate was withheld by fraud, the plaintiff might have a remedy by action: *Milner v. Field* (c). But it is consistent with every allegation in this declaration that the architect was requested by the defendant not to certify because he was dissatisfied with the work. [*Wilde*, B.—The declaration contains an averment that the plaintiff had done all things necessary to entitle him to the certificate,

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(a) 3 B. & S. 364. 372.

(b) 1 Giff. 216. 223.

(c) 5 Exch. 829.

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and that he had completed the works to the satisfaction of the defendant's architect; and that, although the defendant and his architect had knowledge that the plaintiff was entitled to be paid, the architect neglected to certify, "in collusion with the defendant and by his procurement." There is no allegation that the works were done to the satisfaction of the defendant. [*Wilde*, B.—There is an averment that the plaintiff had done all things necessary to entitle him to the certificate.] The word "collusion" does not necessarily imply fraud. [*Pollock*, C. B.—In Webster's Dictionary one definition of "collusion" is "a secret agreement for a fraudulent purpose."]

J. Brown appeared in support of the declaration, but was not called upon to argue (a).

POLLOCK, C. B.—We are all of opinion that the declaration is good, and that the plaintiff is entitled to judgment.

MARTIN, B., and BRAMWELL, B., concurred.

Judgment for the plaintiff.

(a) The point for argument was:—"That the defendant who employs the architect does con- tract with the plaintiff that he will do his duty and act fairly."



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DECLARATION in replevin of two colts of the plaintiff, taken by the defendant from a close called "St. Catherine's Meadow," in the city of Gloucester.

First avowry.—That the city of Gloucester, in the county of the said city, is an ancient city, and the mayor and burgesses thereof, until and at the time of the first election of councillors of the said city under the statute 5 & 6 Wm. 4, c. 76, intituled "An Act to provide for the regulation of municipal corporations in England and Wales," had been and were a body politic and corporate, known by divers names of incorporation, and amongst others by the name of the mayor and burgesses of the town of Gloucester, and by the name of the mayor and burgesses of the city of Gloucester, in the county of the city of Gloucester. That, on the 26th of December, A.D. 1835, the first election of councillors for the said city was holden under the provisions of the said statute, and thereupon, and by virtue of the said statute, the said body corporate took and bore the name of the mayor, aldermen and citizens of the city of Gloucester, in the county of the city of Gloucester, and then became and were, and from thence hitherto have been and still are, a body politic and corporate by and under that name. That, from time whereof the memory of man is not to the contrary, the said close in which, &c., has been and still is a certain common field, formerly called "Archdeacon's Meadow," and now called "St. Catherine's Meadow," which common field was and is situate in the said city of Gloucester, in the county of the same city. That, from time whereof the memory of man runneth not to the contrary, the said

Burgesses created by the Municipal Corporation Act, 5 & 6 Wm. 4, c. 76, are not entitled to any share or benefit of the corporate property enjoyed by the freemen and burgesses of a borough before that Act passed.

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mayor and burgesses, by their several names of incorporation respectively, had and used and respectively were accustomed to have and use, and of right ought to have had and used, for every burgess [being an admitted freeman] of the said city, [and for the particular benefit of every such burgess], common of pasture in, upon, and throughout the said close in which, &c., every year, for a certain number of his own proper beasts, to wit, two horses or three neat beasts, from such time in every year as the said field should be mown and the hay thereof carried away unto the Feast of the Purification of St. Mary the Virgin, that is to say, the 2nd of February, in every succeeding year. That before and at the said time when, &c., the defendant was a burgess [and admitted freeman] of the said city, and as such entitled to have, use and enjoy the said common of pasture in the said close in which, &c.; and because the said cattle of the plaintiff, who was not an admitted freeman of the said city, or otherwise entitled to common of pasture in the said close in which, &c., were, after the said close had been mown and the hay thereof carried away, A.D. 1860, and before the 2nd of February, 1861, that is to say, on the day and year in the declaration mentioned, wrongfully in the said close, doing damage there, so that the defendant could not have or enjoy his said common of pasture and feeding therein in so ample a manner as he could, might and ought to have enjoyed the same, he well avows the taking of the said cattle in the said close as a distress for the said damage.

Second avowry.—That the city of Gloucester, in the said county of the said city, is an ancient city, and the mayor and burgesses thereof have been and are a body politic and corporate, as and by the names of incorporation in the preceding avowry mentioned. That before and on the 6th of February, in the ninth year of the reign of the lord King

Henry the 8th, formerly King of England, William, Abbot of the Monastery of St. Peter in Gloucester and the convents of the same place, was seised in his demesne as of fee in right of his said convent, amongst other things, of and in the said close in which, &c., then called "Archdeacon's Meadow;" and being so seised, on the 6th of February, in the year last aforesaid, a certain indenture was made between the said William of the said monastery and convent and their customary tenants of their lordship or manor of Maisemore, of the one part, and the said mayor and burgesses, by their then names of the mayor and burgesses of the town of Gloucester, of the other part, by which it was witnessed and agreed that the said mayor and burgesses, and their successors for evermore should have common of pasture for their beasts in the said close in which, &c., from such time as the same should be mown and the hay thereof carried away, yearly for evermore, unto the Feast of the Purification of St. Mary the Virgin in the succeeding year; and it was thereby also witnessed and agreed that no burgesses of the said town should have above a certain number, to wit, five beasts, yearly going and depasturing in the said close in which, &c., at any time to use the said close, and that was only to be understood and taken of their own proper beasts and none other; in order that the said close and certain other meadows or pastures in the said deed mentioned should not, with beasts or cattle of strangers having no title of common in the same, be depastured and defouled: it was thereby further witnessed and agreed that as often as the same abbot and convent or their successors, and the said mayor and burgesses or their successors, should perceive any such wrongful using of the said common, that they or either of them, or the successors of either of them, from time to time as should be thought convenient, should drive all manner of beasts and cattle of strangers

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there depasturing and feeding, having no title thereto, and them impound.—Averments: [that the said burgesses mentioned in the said indenture were, at the time of the making of the same, and they and their successors from thence hitherto always have been and still are, admitted freemen of the said city, and that the said common of pasture has always been, from the time of the making of the said indenture hitherto, had, used, and applied for the particular benefit of such burgesses]: that before and at the said time when, &c., the defendant was a burgess and admitted freeman of the said city, the same having been, at the time of the making of the said indenture, the town of Gloucester, and as such entitled to have, use, and enjoy the said common of pasture in the said close in which, &c.—(This avowry then concluded by justifying the taking the plaintiff's cattle, as in the first avowry.)

Third avowry.—That long before, and more than sixty years before the commencement of this suit, the burgesses of the city of Gloucester were, and thence hitherto have been and still are, a body politic and corporate, as and by the names of incorporation in the first avowry mentioned. That the said body by their several names of incorporation respectively, for sixty years next before the commencement of this suit, continually without interruption had and enjoyed as of right, and had been used and accustomed to have and enjoy as of right, and at the said time when, &c., and still of right ought to have had and enjoyed as of right, for the said burgesses [being admitted freemen] of the said city, each and every of them, common of pasture in and upon and throughout the said close in which, &c., every year, for two horses, and three neat beasts, using the said common at the same time, and the same being the own proper beasts of such person, from such time as the said close in which, &c., should be mown and the hay thereof carried away, until the

2nd of February in every succeeding year.—Averments: that the said right of common of pasture was taken and enjoyed as aforesaid by the said corporation of right during the whole of the said period of sixty years next before the commencement of this suit; and that the said right of common of pasture was not at any time during the said period of sixty years taken or enjoyed by any consent or agreement expressly made or given by any person entitled to the said close in which, &c., or any other person whatsoever for that purpose, by any deed or writing whatsoever: that, before and at the said time when, &c., the defendant was a burgess and admitted freeman of the said city, and as such entitled to have, use, and enjoy the said common of pasture in the said close in which, &c.—(This avowry then concluded by justifying the taking of the plaintiff's cattle, as in the first avowry.)

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Cognizances, acknowledging the taking of the plaintiff's cattle, because the corporation of Gloucester had the rights alleged in the above avowries respectively, and justifying as the servant of the corporation.

Demurrer to avowries, and joinder therein.

Third plea in bar to avowries and cognizances.—That the plaintiff, at the said time when, &c., was a burgess of the said city, and the said colts, being his two horses, were his own proper beasts lawfully using the said common.

Eleventh plea in bar to the avowries and cognizances.—That the said mayor and burgesses, by their several names of incorporation respectively, until and at the time of the first election of councillors of the said city under the said statute, from time whereof the memory of man runneth not to the contrary, had and used, and were accustomed to have and use, and of right ought to have had and used, for every burgess whatever of the said town and city respectively, and not for the particular benefit of any class thereof,

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the said common of pasture in, upon, and throughout the said close in which, &c., at the times and for the beasts in the said avowries and cognizances mentioned: and that, from the time of such first election of councillors hitherto, the said mayor, aldermen, and citizens, by their name of incorporation in the said advowries and cognizances mentioned, have thence hitherto continued to be entitled to the right of common before and up to that time vested in the same mayor and burgesses by their ancient name of incorporation, in the same manner as before, save as provided by the said Act.—Averments: that long before and at the said times in the declaration mentioned, and the taking and detaining of the said cattle, he, the plaintiff, was, and still is, an inhabitant householder within the said city of Gloucester, duly enrolled in each year according to the provisions contained in the statute made and passed, &c. (5 & 6 Wm. 4, c. 76), intituled “An Act to provide for the regulation of Municipal Corporations in England and Wales,” and a citizen of the said city and member of the said body corporate, being the mayor, aldermen, and citizens of the said city of Gloucester, in the county of the city of Gloucester, in the said avowries and cognizances mentioned, and one of the councillors of the said city; wherefore, being entitled to use and enjoy the said common of pasture in the said avowries and cognizances mentioned, the plaintiff at the said time when, &c., placed the said cattle, being two horses, then and during all the time aforesaid his own proper beasts, and no more, in the said close in which, &c., to use his said common; and that the same, at the said time when, &c., were depasturing therein and using his said common, and not otherwise, as they lawfully might and were entitled to do for the cause aforesaid.

Twelfth plea in bar to avowries and cognizances.—That up to and at the time of the passing of the said Act, and

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the first election of councillors thereunder, every burgess of the said town and city of Gloucester was an admitted freeman thereof, and there was no burgess thereof who was not an admitted freeman thereof, and that up to the said times in this plea above mentioned the said body politic and corporate, by their said names of incorporation, had and enjoyed, and had been used and accustomed to have and enjoy, the said common of pasture as in those avowries and cognizances mentioned, and that the said right has not been whatever transferred, changed, altered, varied, or modified in any way or manner soever, save so far as the same may have been or was changed, varied, or modified by the said statute. That long before the said times when, &c., and placing the said cattle on the said common as hereinafter mentioned, the plaintiff was resident in the said city, and was a person who, if the said statute had not passed, might, could, and would have been long before an admitted freeman thereof; and that he was and still is an inhabitant householder within the said city, duly enrolled in each year according to the provisions of the said statute, and a citizen of the said city, and member of the said body corporate of the mayor, aldermen, and burgesses of the city of Gloucester, in the county of the city of Gloucester, in the said avowries and cognizances mentioned, and one of the councillors thereof; wherefore the plaintiff, being such person and entitled to use and enjoy the said common of pasture at the said times when, &c., placed the cattle, being two horses, and then and during all the time aforesaid his own proper beasts, and no more, in the said close in which, &c., to use his said common, &c.

Replication to third plea.—That the plaintiff was not, at the said times, when, &c., an admitted freeman of the said city.

Replication to eleventh plea.—That up to and at the

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time of the passing of the said Act and the first election of councillors thereunder, every burgess of the said city was an admitted freeman thereof, and there was no burgess thereof who was not an admitted freeman thereof, and that, at the said times when, &c., the plaintiff was not, nor has ever been, an admitted freeman of the said city.

Demurrer to the twelfth plea, and joinder therein.

Rejoinder to the replication to the third plea.—That, before and at the said times when, &c., the plaintiff was an inhabitant of and a citizen and burgess of the said city, and a person who might, could, and would have been an admitted freeman of the said city if the said Act, intituled &c. (5 & 6 Wm. 4, c. 76,) had not been passed.

There was a similar rejoinder to the replication to the eleventh plea.

Demurrer to the replication to the eleventh plea, and joinder therein.

Demurrer to the rejoinders respectively, and joinder therein.

Dowdeswell, for the plaintiff (a).—The question is whether burgesses created by the Municipal Corporation Act (5 & 6 Wm. 4, c. 76,) are entitled to participate in the right of common enjoyed by the burgesses before that Act. By section 9, "Every male person of full age, who, on the last day of August, in any year, shall have occupied any house, &c., within any borough during that year, and the whole of each of the two preceding years, and also during the time of such occupation shall have been an inhabitant householder within the said borough, or within seven miles of the said borough, shall, if duly enrolled in that year, &c.,

(a) The case was argued in last Michaelmas Term (Nov. 10 and 12) when the Court suggested an amendment, which was made by inserting the words within brackets in the avowries.

be a burgess of such borough, and member of the body corporate of the mayor, aldermen, burgesses, of such borough." The plaintiff is a burgess duly enrolled under that Act, and, therefore, entitled to all the rights heretofore enjoyed by a burgess, unless the Act has by exclusive words deprived him of them. But the Act rather extends the rights of burgesses, by restraining the unlimited power of creating them; for the 3rd section provides that "No person shall be elected, made, or admitted a burgess or freeman of any borough, by gift or purchase." The defendant relies on the 2nd section, which, after reciting that, "In divers cities, towns, and boroughs, the common lands and public stock of such cities &c., and the rents and profits thereof, have been held and applied for the particular benefit of the citizens, freemen, and burgesses of the said cities, &c., or of certain of them, or of the widows or kindred of them, or certain of them, and have not been applied to public purposes," enacts, "That every person who now is or hereafter may be, an inhabitant of any borough, and also every person who has been admitted, or who might hereafter have been admitted, a freeman or burgess of any borough if this Act had not been passed, or who now is, or hereafter may be the wife, or widow, or son, or daughter of any freeman or burgess, or who may have espoused, or may hereafter espouse the daughter or widow of any freeman or burgess, or who has been, or may hereafter, be bound an apprentice, shall have, and enjoy, and be entitled to acquire and enjoy the same share and benefit of the lands, tenements, and hereditaments, and of the rents and profits thereof, and of the common lands and public stock of any borough, or body corporate, and of any lands, tenements, and hereditaments, and any sum or sums of money, chattels, securities for money, or other personal estate, of which any person, or body corporate, may be seized or possessed, in

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whole or in part, for any charitable uses, or trusts, as fully and effectually, and for such time, and in such manner, as he or she, by any statute, charter, bye-law, or custom in force at the time of passing this Act, might, or could have had, acquired, or enjoyed, in case this Act had not been passed.” [Pollock, C. B.—That section merely reserves all rights enjoyed at the time the Act passed.] The section is not restrictive, but enabling; it does not limit the rights in respect of the common lands and public stock to the freemen and burgesses under the old law, but preserves to them and the newly created burgesses rights which would otherwise have been abrogated. The words are “every person who has been admitted, or *who might hereafter have been admitted* a freeman or burgess.” [Bramwell, B.—It proceeds to say, “As fully and effectually, and for such time and in such manner, as he or she, by any statute, charter, bye-law, or custom in force, at the time of passing this Act, might, or could have had, acquired, or enjoyed, in case this Act had not been passed.”] It is admitted on the record that the plaintiff is a person, who, if the statute had not passed, might, could, and would, have been admitted a freeman of the borough, and also that he is an inhabitant householder within the city. He is, therefore, within the express words of the 2nd section. [Pollock, C. B.—The last proviso in that section, is opposed to that view: “Provided also, that nothing in this Act contained shall be construed to entitle any person to any share or benefit of the rights herein reserved, who shall not have first fulfilled every condition which, if this Act had not passed, would have been a condition precedent to his or her being entitled to the benefit of such rights, so far as the same is capable of being fulfilled, according to the provisions of this Act.”] The plaintiff has fulfilled the condition of being a burgess, but the 3rd section of the Act has rendered him

incapable of fulfilling the condition of being a freeman. [*Pollock*, C. B.—The words, “who might hereafter have been admitted a freeman,” do not mean admitted by mere matter of accident, as gift or purchase, but by claim or right.] Unless the burgesses enrolled under this Act are entitled to participate in the property and privileges of the borough, the class entitled may gradually diminish, and at length altogether cease.

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Macnamara appeared for the defendant, but was not called upon to argue (*a*).

POLLOCK, C. B.—I am of opinion that the defendant is entitled to judgment. According to my view of the subject, the 2nd section was introduced before the 9th for the express purpose of reserving all rights in the common lands, and public stock and property of the borough, to the persons who enjoyed them at the time the Act passed. The legislature would seem to have said: “Before we begin to legislate upon this subject, and take away, alter, or in any manner affect, the rights and privileges of existing freemen and burgesses, and create new rights in another class, we will, in express terms, reserve to the present freemen and burgesses, and to all persons who might hereafter become such” (which must mean all who have the *right* to become such, either by birth, marriage, or apprenticeship,) “all the rights and benefits in the corporate property

(*a*) The points for argument were:—“1. That the plaintiff not being a freeman of the city of Gloucester is not entitled to right of common in the land in question. 2. That the effect of the Municipal Corporation Act (5 & 6 Wm. 4, c. 76, s. 2,) was to

reserve the right of common in the said land for the freemen of the city of Gloucester, and not to extend it to persons who were made burgesses of the city by reason only of the provisions of the Act.”

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which they now enjoy." Then there is added to the 2nd section a proviso, that no person shall be entitled to any share or benefit of the rights reserved by that Act, unless he has fulfilled every condition which, if the Act had not passed, would have been a condition precedent to his being entitled to the benefit of such rights, so far as such condition is capable of being fulfilled. That being so, it seems to me that the plaintiff, who merely claims as a burgess enrolled under the Act, is not entitled to the benefits of any of the rights reserved to burgesses or freemen under the old law. If a new class of burgesses were to share in these rights, the Act would fail in its manifest intention of reserving them to the burgesses and freemen who enjoyed them at the time it passed. So far as I am aware, this is the first time since the Municipal Corporation Act passed that a claim of this kind has been made by a burgess created under it.

MARTIN, B.—I am of the same opinion; and I think the construction of the statute clear. The 6th section enacts, "That after the first election of councillors under this Act, in any borough, the body, or reputed body corporate, named in the said schedules in connection with such borough, shall take and bear the name of the mayor, aldermen and burgesses of such borough." The 13th section enacts that, after the passing of this Act, no person shall be enrolled a burgess of any borough, for the purpose of enjoying the rights conferred for the first time by this Act, in respect of any title other than by occupancy and payment of rates within such borough." The 15th section requires the overseers of the poor of every parish, wholly or in part within any borough, on a certain day in every year, to make out an alphabetical list, to be called the "Burgess List," which, by the 18th section, is to be revised

by the mayor and two assessors. By the 22nd section, the lists so revised and signed by the mayor are to be delivered by him to the town clerk, who is to cause the same to be copied in a book, which is to be the "Burgess Roll," that is, a list of the persons enrolled as burgesses under the 13th section, and having the rights conferred upon them by the Act upon being qualified as required by the 9th section. In fact, they constitute a portion of the body corporate, called "The Mayor, Aldermen, and Burgesses" of the borough. But "burgess" was a term, which, before this Act, had been used with reference to members of the corporation of the city of Gloucester, when their corporate name was "The Mayor and Burgesses of the City of Gloucester;" and I am of opinion that, to entitle a burgess to the benefit of the right of common now claimed, he must be a person who would have been entitled to it, as a burgess of the city of Gloucester, if this Act had not passed. The legislature, by the 5th section, requires the town clerk of every borough to make out a list, to be called "The Freeman's Roll," of all persons who, at the time of the passing of the Act, have been admitted as burgesses or freemen of such borough; "and any person who shall, hereafter, become entitled to be admitted a burgess or freeman in respect of birth, servitude, or marriage, shall, upon his claim being established, be admitted and enrolled upon that roll."

Such being the general scope of the Act, what is the meaning of the 2nd section? If read solely with reference to the city of Gloucester, it would stand thus:—"And whereas in the city of Gloucester the common lands and public stock, and the rents and profits thereof, have been held and applied for the particular benefit of the citizens, freemen, and burgesses of the said city, or of the widow or kindred of them, or certain of them, and have not been applied to public purposes: be it therefore enacted, that every person

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who has been admitted, or who might hereafter have been admitted, a freeman or burgess of the city of Gloucester if this Act had not been passed, or who now is or hereafter may be the wife or widow, or son or daughter, of any freeman or burgess, &c., shall have and enjoy and may be entitled to acquire and enjoy the same share and benefit of the lands, tenements, and hereditaments and of the rents and profits thereof, and of the common lands and public stock of the city of Gloucester, &c., as fully and effectually, and for such time and in such manner, as he or she shall, by any statute, charter, bye-law, or custom in force at the time of passing this Act might or could have had, acquired, or enjoyed in case this Act had not been passed." Now, assuming that the plaintiff is a burgess duly enrolled under this Act, it seems to me that does not give him any right to the enjoyment of this common land, but that the right is confined to persons who would have been entitled as burgesses or freemen if this Act had not passed.

I am further of opinion that the circumstance that the corporation of Gloucester might formerly have admitted freemen by gift or purchase, and that the plaintiff would have been an admitted freeman of the city if this Act had not passed, confers upon him no right whatever to the claim which he sets up.

BRAMWELL, B.—I am also of opinion that the defendant is entitled to judgment. I feel no difficulty about the twelfth plea in bar, because it does not shew that the plaintiff might, *as of right*, have been admitted a freeman or burgess of the borough if this Act had not passed. Possibly the legislature merely intended to prevent a general application of the corporate property for the benefit of all the burgesses, in order to preserve the rights enjoyed by those who were entitled to the benefit of it when

the Act passed; but I doubt whether, if the attention of the legislature had been called to the subject, they would not have inserted some other provision, for it never can be supposed that they contemplated a state of things where no one would derive any benefit from the corporate property; and yet, as pointed out by Mr. *Dowdeswell*, it may happen that the old class of freemen and burgesses, and those entitled under them, will be gradually worn out and at length become extinct. But, however that may be, we must construe the Act according to its ordinary signification.

I go a long way with Mr. *Dowdeswell* in the first part of his argument. He says that, before the Municipal Corporation Act passed, the right to the enjoyment of the common lands and public stock was vested in the freemen and burgesses of the borough, and that the same right would be acquired by any burgess, though created in a new way, under that Act, unless it contains some provision to the contrary. Now, I doubt whether the proviso at the end of the 2nd section is a disqualification. It says that no person shall be entitled to any share or benefit of the rights reserved by that section, "who shall not have fulfilled every condition which, if the Act had not passed, would have been a condition precedent to his or her being entitled to the benefit of such rights, so far as the same is capable of being fulfilled according to the provisions of the Act." The plaintiff has fulfilled every condition capable of being fulfilled according to the provisions of the Act, for he has become a burgess of the borough. It seems to me that the proviso in the 2nd section has a different meaning from that attributed to it by the Lord Chief Baron. The earlier part of that section says, "that every person who has been admitted, or who might if that Act had not passed have been hereafter admitted, a freeman or burgess of any borough, or who now is or hereafter may be the wife or widow, or son or

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daughter of any freeman, or burgess, or who may have espoused or may hereafter espouse the daughter or widow of any freeman or burgess, or who may have been or may hereafter be bound an apprentice, shall have and enjoy the same share and benefit of the common lands and public stock of any borough as he or she, by any statute, charter, bye-law or custom, might or could have acquired or enjoyed in case this Act had not passed." I understand the proviso in the 2nd section to mean that where, before the Act, a freeman or burgess, or the wife or widow or son or daughter of a freeman or burgess, or any other of the class enumerated, would have had to perform some condition precedent to his or her being entitled to the benefit of the rights reserved by the Act, they must now perform it so far as it is capable of being performed. But my difficulty arises from the provision that the freemen or burgesses, including persons entitled to become freemen or burgesses, either by birth, marriage or servitude, are to enjoy the same share and benefit of the corporate property as fully and effectually as they might and could have enjoyed it if the Act had not passed. If Mr. *Dowdeswell's* construction of the Act is right, the old freemen or burgesses of the city of Gloucester would have in addition to their number all the inhabitants of the borough whose names were on the burgess roll. It seems to me that the words "as fully and effectually" impliedly exclude the new class of freemen or burgesses created by this Act. Upon that ground, I cannot entirely agree with the first part of Mr. *Dowdeswell's* argument.

Then, with respect to the other part of his argument, that, by the 2nd section, "every person who now is or hereafter may be an inhabitant of the borough" is entitled to share in the corporate property in the same way as before the Act, and therefore the plaintiff being an inhabitant became entitled by becoming a burgess.—I do not think that argument well

founded, because it seems to me that the expression "an inhabitant of any borough," means an inhabitant who *had the right*, and that the statute does not give it to any one who thereafter being an inhabitant shall become a burgess, for, if that were so, the old freemen or burgesses, as I have already stated, could not enjoy their rights as fully and effectually as they did before, because a large number of additional persons would share it with them, which would, of course, diminish the extent of their enjoyment. Upon these grounds I think the defendant entitled to judgment.

Judgment for defendant.

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DECLARATION.—For money payable by the defendant to the plaintiffs for divers calls upon the shares in the capital of the plaintiffs, duly made by the plaintiffs, then and still being a joint stock Company, duly registered under the Joint Stock Companies' Acts in force, which calls were duly made upon the defendant, and became due by him for and in respect of 100 shares in the capital of the said Company, of which said shares the defendant was, when the said calls respectively were made, and still is the holder, and which calls remain unpaid, although the times duly appointed for the payment thereof have respectively elapsed, and although the defendant has had due notice of the premises, and all conditions by law required to entitle the plaintiffs to be paid by the defendant the amount of the said calls have been fulfilled: And for interest payable by the defendant, as and being the holder of the shares aforesaid to the plaintiffs

To an action for calls on shares in a joint stock Company incorporated under the 19 & 20 Vict. c. 97, it is no answer that the defendant became a shareholder upon the faith that the capital of the Company would be of the amount stated in the memorandum of association and that only a small, insignificant and insufficient portion thereof was subscribed.

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the said common of pasture in, upon, and throughout the said close in which, &c., at the times and for the beasts in the said avowries and cognizances mentioned: and that, from the time of such first election of councillors hitherto, the said mayor, aldermen, and citizens, by their name of incorporation in the said advowries and cognizances mentioned, have thence hitherto continued to be entitled to the right of common before and up to that time vested in the same mayor and burgesses by their ancient name of incorporation, in the same manner as before, save as provided by the said Act.—Averments: that long before and at the said times in the declaration mentioned, and the taking and detaining of the said cattle, he, the plaintiff, was, and still is, an inhabitant householder within the said city of Gloucester, duly enrolled in each year according to the provisions contained in the statute made and passed, &c. (5 & 6 Wm. 4, c. 76), intituled “An Act to provide for the regulation of Municipal Corporations in England and Wales,” and a citizen of the said city and member of the said body corporate, being the mayor, aldermen, and citizens of the said city of Gloucester, in the county of the city of Gloucester, in the said avowries and cognizances mentioned, and one of the councillors of the said city; wherefore, being entitled to use and enjoy the said common of pasture in the said avowries and cognizances mentioned, the plaintiff at the said time when, &c., placed the said cattle, being two horses, then and during all the time aforesaid his own proper beasts, and no more, in the said close in which, &c., to use his said common; and that the same, at the said time when, &c., were depasturing therein and using his said common, and not otherwise, as they lawfully might and were entitled to do for the cause aforesaid.

Twelfth plea in bar to avowries and cognizances.—That up to and at the time of the passing of the said Act, and

the first election of councillors thereunder, every burgess of the said town and city of Gloucester was an admitted freeman thereof, and there was no burgess thereof who was not an admitted freeman thereof, and that up to the said times in this plea above mentioned the said body politic and corporate, by their said names of incorporation, had and enjoyed, and had been used and accustomed to have and enjoy, the said common of pasture as in those avowries and cognizances mentioned, and that the said right has not been whatever transferred, changed, altered, varied, or modified in any way or manner soever, save so far as the same may have been or was changed, varied, or modified by the said statute. That long before the said times when, &c., and placing the said cattle on the said common as hereinafter mentioned, the plaintiff was resident in the said city, and was a person who, if the said statute had not passed, might, could, and would have been long before an admitted freeman thereof; and that he was and still is an inhabitant householder within the said city, duly enrolled in each year according to the provisions of the said statute, and a citizen of the said city, and member of the said body corporate of the mayor, aldermen, and burgesses of the city of Gloucester, in the county of the city of Gloucester, in the said avowries and cognizances mentioned, and one of the councillors thereof; wherefore the plaintiff, being such person and entitled to use and enjoy the said common of pasture at the said times when, &c., placed the cattle, being two horses, and then and during all the time aforesaid his own proper beasts, and no more, in the said close in which, &c., to use his said common, &c.

Replication to third plea.—That the plaintiff was not, at the said times, when, &c., an admitted freeman of the said city.

Replication to eleventh plea.—That up to and at the

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articles of association prescribing regulations for the Company, but if no such regulations are prescribed, the regulations contained in the table B. in the schedule of the Act, are to be deemed the regulations of the Company. Section 10 prescribes the form of the articles of association, and renders them, when registered, binding in the same manner as the memorandum of association. By section 13, upon the memorandum of association being registered, the registrar shall certify that the Company is incorporated, and thereupon the subscribers of the memorandum of association and all future subscribers shall become a body corporate by the name prescribed in the memorandum of association, but with such pecuniary liability as is thereafter mentioned. Then, by table B. (2), the Company may make calls upon the shareholders, provided twenty-one days notice be given, and the shareholders shall be liable to pay the calls. Expenses must necessarily be incurred in the formation and incorporation of the Company, and how are they to be defrayed unless they have power to enforce the payment of calls? The defendant seeks to relieve himself from his share of the expenses, while at the same time he retains his interest in the profits of the Company. Again, suppose the Company is in debt, and in the course of being wound up, the 61st, 62nd and 63rd sections render the existing and some of the former shareholders liable to contribute to the debts and the expenses of the winding-up. The 83rd section empowers the Court to make calls. The plea is framed with reference to the case of *Fox v. Clifton* (a), but that was not the case of a corporation, but an ordinary partnership, and the question was whether the defendants had become partners in the Company so as to constitute the directors their agents for the purpose of binding them by contracts within the scope of the partnership. Here, there is an express authority to make calls, and it is

(a) 6 Bing. 776.

declared that the shareholders shall be liable to pay them. This point was raised in *The Hornbeach Coal Company v. Teague* (a), and *Martin, B.*, expressed an opinion, that if a Company is formed to consist of a certain number of shares, and hardly a fourth of the shares are taken up, it is not competent to a small portion of such shareholders to make calls, and insist on carrying on the Company. That, however, was a mere dictum, and not necessary for the decision of the case. *The London and Continental Assurance Society v. Redgrave* (b) decided that it is not competent to a shareholder in a completely registered joint stock Company, who has executed the deed of settlement, with a recital therein that the whole number of shares have not been subscribed for, to defend himself against a claim for calls on the ground that the directors have proceeded to carry on business with less than the stipulated amount of capital subscribed. The facts disclosed by the plea might be ground for an application to a Court of equity to restrain the directors from carrying on the business of the Company until the entire capital was subscribed, but they afford no defence at law.

Garth, in support of the plea.—The Company is not in a condition to make calls. It is not enough that it is registered and incorporated, but sufficient capital must be subscribed to carry into effect the purposes for which the Company was incorporated. It is not competent for seven persons, by merely subscribing for one share each, to make calls upon the shareholders. [*Martin, B.*—Then who is to pay the preliminary expenses?] If the Company has not sufficient capital to carry on its business, it must be wound up. [*Martin, B.*—The legislature may have intended to avoid that, by enabling the Company to make

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(a) 5 H. & N. 151.

(b) 4 C. B., N. S. 524.

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calls upon the shareholders. *Wilde, B.*—When the memorandum of association is registered, the Company becomes incorporated for the purposes for which it was formed ; but they may, if they wish, have articles of association prescribing special regulations, as for instance, that the business of the Company shall not be carried on until a certain amount of capital is subscribed.] The true principle is stated by *Martin, B.*, in *The Howbeach Coal Company v. Teague (a)*.

Hayes, Serjt., replied.

POLLOCK, C. B.—This is an action for calls upon shares in a company registered and incorporated under the Joint Stock Companies Act, 19 & 20 Vict. c. 47, and the answer made by the plea is, in substance, that the defendant did not subscribe to this Company, but to another and a different Company. The question is, whether the act of parliament, which has created the Company, has imposed the restraint now sought to be placed on the power to make calls. It appears to me that it has not. By section 13, when the registrar of joint stock Companies has certified that the Company is incorporated, they become a body corporate by the name prescribed in the memorandum of association, “but with such pecuniary liability on the part of the shareholders as is hereinafter mentioned.” That is to be found in Table B. (2) which says that the Company may make such calls upon the shareholders as they think fit, provided twenty-one days’ notice is given, “and each shareholder shall be liable to pay the amount of calls so made to the persons and at the times and places appointed by the Company.” Under these circumstances there is no difficulty in coming to a conclusion. The Act authorized this Company to be formed and registered: it has been formed and registered, and has become a body corporate

(a) 5 H. & N. 151.


entitled to make calls. The defendant has subscribed for shares in the Company, and is therefore liable to pay the calls, unless the Act has created some exemption. I can find none; on the contrary, the moment the Company is incorporated they are empowered to make calls upon the shareholders. For these reasons I think that the plea is bad, and that the plaintiffs are entitled to judgment.

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MARTIN, B.—I also think that the plea is bad. The question depends on the construction of the act of parliament, and I think we ought to give the Act its ordinary meaning and carry out to its full extent that which the legislature intended. Even if the result of such a construction be attended with injustice, we must deal with the statute as we find it, instead of endeavouring to tamper with it and give it what is supposed to be a construction more consonant with justice. If an enactment be unreasonable or improper, it is the legislature who ought to interfere and set it right. In my opinion a great deal of mischief has resulted from giving forced constructions to acts of parliament for the purpose of carrying out the supposed justice of the case.

I entertain the opinion which I expressed in *The Howbeach Coal Company v. Teague*, that persons ought not to be allowed to combine together to form a company and obtain a certificate of registration, and, when only a small portion of shares are subscribed for, make calls on that limited number of shareholders, and carry on the Company against their will. Still, I am now satisfied that such is the effect of the act of parliament, and we are bound to carry out that which the legislature has enacted.

BRAMWELL, B.—I am also of opinion that the plaintiff is entitled to judgment. I agree with my brother *Martin* as to the construction which ought to be put on acts of parlia-


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ment; and I also think that under this Act great injustice might be done by a few persons forming a Company, and taking a nominal amount of shares, and when a sum is subscribed not sufficient to carry on the business of the Company, incurring expenses, which must of necessity be borne by the shareholders, while, if the Company succeeds, the promoters will perhaps allot to themselves a large number of shares. That is, no doubt, a possible state of things; but, even if it were probable, I think that we ought to construe this act of parliament according to its plain and ordinary meaning.

Now, in the first place, it is manifest that when the Company is registered and the registrar has certified that it is incorporated, it becomes a body corporate; and then, by the second regulation in table B., the Company may from time to time make such calls upon the shareholders in respect of monies unpaid on their shares as they think fit. But then it is said that they cannot make calls when only a small portion of the capital has been subscribed. I am unable to put that qualification on the act of parliament. Nothing but the most cogent necessity would justify a qualification not found in the words of the Act, and in truth there is no necessity for it, because persons need not become shareholders in a Company whose memorandum of association is not accompanied by articles of association prescribing regulations so as to preclude the directors from carrying on the business of the Company until the whole of its proposed capital has been subscribed. If seven or more persons have bonâ fide registered a memorandum of association, why should not others who afterwards join them, with the expectation of the entire capital being subscribed, be as much liable for the expenses of forming the Company as the original promoters of it? I am at a loss to see why they should not.

I will only add that, in my opinion, the promoters of a

Company ought not to commence business when the number of shares subscribed for is too small and insufficient to carry it on. It is not necessary, however, to say anything on that point, and I should not have adverted to it had not the same opinion been entertained by my brother *Martin* when he made the observations in *The Howbeach Coal Company v. Teague* (a).

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WILDE, B.—I am of the same opinion. I quite agree as to the mode in which the Act ought to be construed, and I cannot help adding that this case does not disclose any impropriety in the Act, or afford any reason for putting a different construction upon it. In substance, the Act provides that seven or more persons, by subscribing a memorandum of association, and complying with the requisitions of the Act as to registration, may form themselves into an incorporated Company. They may also, if they please, add to the memorandum of association articles of association, prescribing regulations for the Company, and, amongst others, a provision that the business of the Company shall not be commenced until a definite amount, or the whole capital, has been subscribed. But when the memorandum of association is registered, and the registrar has certified that the Company is incorporated, they immediately become a body corporate; and if there are no articles of association prescribing regulations for the Company, the legislature imposes on them the regulations contained in table B. in the Act as the regulations by which the Company and the shareholders shall be bound, and under those regulations there is no doubt that the directors are entitled at once to commence business and make calls. I cannot see what hardship there is in that, because every person when he becomes a subscriber knows or ought to know, or has the

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means of knowing, what are the regulations of the Company, and if he finds that they contain no restriction against commencing business with an inadequate capital, it is his own fault to become a shareholder. The Act seems framed on the principle which the legislature constantly adopts; that of giving the freest possible latitude to the formation of Companies, and letting persons who are willing to become subscribers take care of themselves. That seems to me a sound principle, and better than inducing persons to depend on the safeguards, as they are called, of the law, but which may prove fallacious. However, whether that be so or not, it is plain that immediately the promoters of this Company subscribed the memorandum of association, and it was registered, and the registrar had given his certificate, they became a body corporate, and were, under table B., entitled to make calls although only a small portion of the capital was subscribed.

Judgment for the plaintiffs.

May 7.

PILLOT v. WILKINSON.

The plaintiff
purchased
wine lying at
the defend-
ant's wharf
from the
holder of a
warrant, given

TROVER.—For that the defendant converted and wrongfully deprived the plaintiff of the use and possession of his goods, that is to say, 49 cases of champagne, whereby the plaintiff was prevented from selling the same.

by the defendant for its delivery. The vendor indorsed the warrant generally. The plaintiff sent it so indorsed to the wharf, and obtained samples of the wine. A notice from the Lord Mayor's Court was subsequently served at the wharf attaching the vendor's goods in the defendant's custody, and a description of the wine was at the time of service indorsed on the back of the notice, and shewn to the defendant's manager. The plaintiff on afterwards producing his warrant at the wharf, and demanding the wine, was told by the manager (the defendant being absent) that the wine was stopped on account of the attachment. The same day the plaintiff's attorney wrote to the defendant to demand the delivery of the wine by 11 o'clock the next day. The defendant's manager called next morning on the plaintiff's attorney after seeing the defendant and stated that the matter required consideration, and that the defendant would consult his attorney. But the same day at noon a writ was issued.—*Held*: first, that the wine was not in the custody of the law. Secondly, that on these facts there was evidence of a conversion, dissentiente *Bramwell*, B.

Pleas: First, not guilty. Secondly, a denial that the goods were the plaintiff's as alleged. Issues thereon.

This action was tried before *Pollock*, C. B., at the London Sittings after last Michaelmas Term, when the following facts appeared.—The defendant was a warehouseman and wharfinger, and the cases of wine which formed the subject of the action had been deposited by Messrs. Bennett & Co. at his warehouse. A warrant for the wine, in the ordinary form, was given to Messrs Bennett & Co., deliverable to them or their order by indorsement thereon, which was signed by Grueber the warehouse-manager, and Oram, a clerk in the employ of the defendant. The warrant was subsequently indorsed by Bennett & Co. to Henry & Co., who on the 5th of July sold the wine to the plaintiff, received payment, for it, and delivered to the plaintiff the warrant generally indorsed. The plaintiff sent to the defendant's wharf on the 7th of July, and again on the 14th, for samples of the wine. The warrant was upon each occasion produced at the wharf; and, on its production, the clerk Oram gave samples, according to the usual practice, and indorsed upon the warrant a memorandum of the number of bottles withdrawn, to which he subscribed his initials. The evidence was conflicting upon the question whether a sampling order, signed by a clerk of the plaintiff, had been sent along with the warrant. It did not appear, however, that the defendant, or any of his clerks, were in fact aware either that the wine had been sold to the plaintiff, or that he was the holder of the warrant.

On the 22nd of July the following notice of attachment, issued the same day out of the Lord Mayor's Court, was served at the defendant's wharf.

"To Mr. Thomas Wilkinson,

"22nd day of July, 1862.

"Take notice, that by virtue of an action entered in the

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Lord Mayor's Court, London, on the 22nd day of July, 1862, against John Henry trading under the name, style, or firm of J. Henry & Co., defendant, at the suit of Richard MacHenry plaintiff, in a plea of debt upon demand of 50*l.*, I do attach all such monies, goods, and effects, as you now have, or which hereafter shall come into your hands or custody, of the said defendant, to answer the said plaintiff in the plea aforesaid, and that you are not to part with such monies, goods, or effects, without licence of the said Court."

(Signed) "Serjeant at Mace."

"Lord Mayor's Court Office."

The notice of attachment was served by the Deputy Serjeant at Mace. The clerk to the attorney of the plaintiff in the Mayor's Court accompanied the Deputy Serjeant at Mace, and indorsed upon the back of the notice of attachment, before it was served, the particulars of the goods which form the subject of the present action, and the attention of the manager, Grueber, was directed to the indorsement.

Another notice of attachment, issued on the 16th from the Lord Mayor's Court against the goods of the same defendant in an action at the suit of one Aron, was also served at the same time, but no particulars were indorsed upon it.

On the 24th of July the plaintiff and his attorney called at the defendant's wharf, and saw the manager Grueber, to whom they produced the warrant, and explained that the plaintiff had purchased the wine, which he had come to demand. Grueber informed them that the wine was stopped on account of an attachment, but, upon searching for it, he was unable to find it, or to tell them against whom it had issued. He stated, however, that Mr. Wilkinson had gone to Lloyd's, and had probably taken the papers with him. The plaintiff's attorney then told him, that the plaintiff had already lost one customer

for the wine, and if he did not have it that day, it would be a loss. Grueber offered to accompany them to Lloyd's. They went there, but found that the defendant had left and gone home. On the same day the plaintiff's attorney wrote to the defendant as follows:—

“ 1, Circus Place, Finsbury Circus, E.C.

“ Thomas Wilkinson, Esq., “ 24 July, 1862.

“ Botolph Wharf, Lower Thames Street,

“ Sir,

“ We are instructed by Mr. Pillot, the holder of warrant No 7115 for 49 cases of wine, to request the immediate delivery of such cases of wine, and to apply to you for compensation for the loss he has sustained by your retaining the same. Our instructions are to adopt immediate proceedings, and we shall therefore feel obliged by your communicating with us by 11 o'clock to-morrow morning, so that, if satisfactory, our further intervention in the matter may become unnecessary. Should you still decline to deliver the goods, please send us the name of your solicitor; to whom we may send process.

“ We are Sir, &c.

“ Digby & Sharp.”

On the morning of the 25th, but at what exact time did not appear, Grueber having seen the defendant in the interval, called upon the plaintiff's attorney, and told him that the matter required consideration, and the defendant would consult his attorney.

The plaintiff's attorney received the same day the following letter from the defendant's attorney:—

“ Sussex Chambers, Duke Street, St. James's.

“ Gentlemen.

“ July 25th, 1862.

“ Mr. Wilkinson, of Botolph Wharf, has sent us your letter of yesterday's date with instructions to communicate with you respecting it. The matter appears complicated,

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and we are not yet fully acquainted with the circumstances. We trust you will allow time for inquiry, as Mr. Wilkinson's only desire is to do what is right.

"We are Gentlemen, &c.

"F. Miller & Son."

The writ, had been issued at 12 o'clock the same day before this letter was received.

The plaintiff had lost a customer by the detention of the wine.

On the 28th of July a scire facias was issued from the Lord Mayor's Court in the action of Mac Henry v. Henry, calling on Mr. Wilkinson, the present defendant, to shew cause why the plaintiff in the Lord Mayor's Court should not have judgment against him for the appraisement of the goods therein described, theretofore attached in his hands as the goods and chattels of J. Henry, trading under the name, style or firm of J. Henry and Co. The goods described in the body of the scire facias were the cases of wine forming the subject of the present action. The scire facias was served on the 31st, but it did not appear that any further proceedings had been taken in the attachment. No step appeared to have been taken in the other attachment subsequent to the service of the notice of attachment. The goods had since remained in the possession of the defendant, who had never made any offer to give them up.

A verdict was entered, under his Lordship's direction, for the plaintiff, leave being reserved to move to enter the verdict for the defendant; the Court to have power to draw inferences of fact.

Montague Smith, in last Hilary Term, obtained a rule nisi accordingly; upon the ground that the goods were subject to an attachment in the Mayor's Court, and were in custodiâ legis, and that there was no conversion by the defendant under the circumstances proved.

Bovill and *Prentice* shewed cause.—The goods were never in the custody of the law. The notice of attachment could only affect the interest of the defendant in the Mayor's Court: *Smith v. Goss* (a). But his interest had ceased by the transfer to the plaintiff before the notice issued. The goods remained, notwithstanding the notice, in the possession and under the control of the defendant: *Mallalieu v. Laugher* (b). No custom was proved to attach specific goods. The terms in which the notice is couched shew that it has no such object. It purports merely to be a notice of attachment of "all such monies, goods and effects, as the garnishee now hath, or which shall hereafter come into his hands or custody, of the said defendant." The memorandum indorsed by the attorney's clerk cannot alter the effect of the attachment. But further, it is clear that an attachment cannot be pleaded in bar to an action for the recovery of the property attached, until judgment has been obtained in the attachment, and execution thereon executed: *Brandon on Foreign Attachments*, p. 139. The defendant's right course was to appear in the Mayor's Court, and plead nil habet. On behalf of the defendant, the case of *Verrall v. Robinson* (c) will be relied on. That case may, perhaps, be supported on the ground that the facts there proved did not establish a conversion; but the opinion expressed in the judgment that the property attached was in *custodiâ legis*, is, it is submitted, without foundation. The facts of the case are, moreover, distinguishable.

Secondly, the facts here establish a conversion. The warrant gave notice to the defendant, that the defendant in the Mayor's Court had parted with his property in the goods, and to that warrant the defendant attorned. A wharfinger detains goods, when demanded by the true owner, at his


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(a) 1 Camp. 282.

(b) 3 C. & P. 551.

(c) 2 C. M. & R. 495.

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peril: *Wilson v. Anderton* (a). The refusal to deliver on the ground of the attachment was clearly a wrongful act.

Montague Smith and Freeman, in support of the rule.—First, as to the custody of the law. If the ground of the judgment in *Verrall v. Robinson* (b) can be supported, that case is decisive. The process in the Mayor's Court is directed against specific goods. The particulars of the goods, though merely indorsed on the notice of attachment, are specified in the body of the scire facias.

But the main point is, that upon the facts proved there was no conversion. The defendant had no notice that the plaintiff was the owner of the goods. The circumstances under which the samples were delivered did not constitute an attornment. The refusal to deliver was not absolute, but qualified in such a way as to afford no evidence of conversion: *Clark v. Chamberlain* (c). It was a mere request of time for inquiry. A bonâ fide hesitation on the part of the defendant was reasonable: *Gunton v. Nurse* (d), *Alexander v. Southey* (e). In *Vaughan v. Watt* (f), on a similar state of facts, *Parke, B.*, said, "It was a question for the jury, whether the defendant meant to apply the goods to his own use, or assert the title of a third party to them, or whether he only meant to keep them in order to ascertain the title to them, and clear up the doubts he then entertained on the subject, and whether a reasonable time for doing so had not elapsed, without which it would not be a conversion. It ought, therefore, to have been left to the jury, whether the defendant had a bonâ fide doubt as to the title to the goods, and if so, whether a reasonable time for clearing up that doubt had elapsed." The Court will infer

(a) 1 B. & Adol. 450.

(b) 2 C. M. & R. 495.


(c) 2 M. & W. 78.

(d) 2 B. & B. 447.

(e) 5 B. & Ald. 247.

(f) 6 M. & W. 492.

that a bonâ fide doubt here existed in the mind of the defendant. In *Verrall v. Robinson* (a) the refusal to deliver up a chaise to the owner on the ground of an attachment from the Sheriffs' Court was held to be no conversion, although the defendant in the Sheriffs' Court, who had hired the chaise and placed it at livery with the defendant, was present when the plaintiff demanded it, and admitted the plaintiff's title. In *Burroughes v. Bayne* (b), Channell, B., in his judgment, expressly guards himself against the supposition that every detention is a conversion. No claim inconsistent with the plaintiff's title was set up by the defendant either in himself or in any other person.—They also referred to Com. Dig., "Attachment" (A).

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Cur. adv. vult.

The learned Judges having differed in opinion, the following judgments were now delivered.

BRAMWELL, B., said.—I am of opinion that this rule should be made absolute, on the ground that there was no evidence of a conversion. The facts are shortly these:—Certain goods, which belonged to the plaintiff, were lying in the warehouse of the defendant. The plaintiff, on applying for them there, was referred to the defendant's warehouseman, who told him that, in consequence of a foreign attachment, there was a difficulty, and that he did not know whether he ought to deliver up the goods. He proposed, however, that they should go to Lloyd's in search of Mr. Wilkinson, the defendant. They accordingly went to Lloyd's, but when they got there Mr. Wilkinson had gone home, and, in consequence, nothing was done. The plaintiff's attorney wrote the same day to the defendant, demanding possession of the goods by eleven o'clock the

(a) 2 C. M. & R. 495.

(b) 5 H. & N. 296.

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next day. The defendant's attorney replied the next day, stating that there was a question about a foreign attachment, and asking for time to make inquiries, and ascertain the actual facts. But before this letter was received, the writ in this action was issued.

The facts as to the foreign attachment are as follows:— An officer from the Lord Mayor's Court came to the defendant's warehouse, and there produced a notice of attachment directed to the defendant, commanding him to detain the goods, not of the plaintiff, but of some third person, whom it specified. The person who served the process, informed the defendant that it related to certain goods which he described, and which are the goods forming the subject of the present action.

Now, I am clearly of opinion that there was nothing in the mode in which this process was served, to constitute a defence to the present action. It has never yet been claimed as part of the custom of foreign attachment, that process directed to A., informing him that B.'s goods are attached, will justify A. in detaining goods belonging to C., merely because the server of the process tells him that those particular goods form the subject of the attachment. The only colour for such a contention is to be found in the language of Lord *Abinger*, and Mr. Baron *Alderson*, in the case of *Verrall v. Robinson* (a), who are there reported to have said that the goods were in "the custody of the law," and that, consequently, the defendant was justified in not delivering them up. The expression so used was, I think, inaccurate, but the decision was perfectly correct. The defendant was justified in taking time for consideration, and to obtain advice. But neither in that case, nor the present, was there any actual custody of the law. The officer did not here remain in possession: he merely

(a) 2 C. M. & R. 495.

served an attachment against the goods of one person, and stated that it attached goods which belonged to another.

I am, however, of opinion, that the rule should be absolute, on the ground that there was no evidence of a "conversion." This word, when used in its natural sense, is open to no objection. Thus, for instance, where the defendant either drinks the plaintiff's wine, or burns his wood, or fires off his gun, or even detains a picture belonging to the plaintiff, and hangs it up in his drawing-room to enjoy the pleasure of looking at it; there is, in such cases, a conversion to the defendant's use. But, unfortunately, the meaning of this word has been extended, from its natural signification, to acts which are in no sense an actual conversion. Now, where this is the case, it invariably causes great difficulty in administering the law, and is very likely to lead—as in this form of action it has led—to serious injustice. Still, if on the authority of decided cases the facts of this case established a conversion, I should feel bound to defer to their authority. They are, however, diametrically opposed to any such view. The defendant never refused to give up these goods. He did not assert any title or right to detain them in himself, or in any other person; nor did he deny they were the plaintiff's. All that took place was, that the defendant's clerk said he was in some difficulty about the matter, and proposed they should go and consult the defendant. They were unable to find the defendant at the time, and the next day the defendant's attorney wrote to the plaintiff's attorney, asking him not to be precipitate, but to allow time to make some inquiry into the circumstances. If the plaintiff had refused to give any time, and had insisted on a distinct answer, the defendant might very probably have surrendered the goods. There was, in fact, no conversion

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in any sense of the word, neither *from* the plaintiff nor *to* the defendant. But, notwithstanding this, the defendant will, in this form of action, be liable for the full value of the goods. In my judgment there is no evidence of a conversion, and this rule should be made absolute.

MARTIN, B., said.—In this case I think there was evidence to go to the jury of a “conversion.” I retain the opinion which I expressed in *Burroughes v. Bayne* (a), where, a similar question having arisen, I stated what in my opinion was the meaning which the law has assigned to this word. My brother *Channell* also there expressed a similar opinion. In my judgment, where one person detains from another goods, which he either actually knows or has the means of knowing, and which, by instituting proper inquiries, he might have ascertained to be that person’s property, that detention the law deems a “conversion.” The term may not be a strictly appropriate one, but it was used in this sense in the time of Lord *Holt* (b), who says, “The very denial of goods to him that hath a right to demand them, is an actual conversion, and not only evidence of it; for what is a conversion but the assuming upon oneself the property and right of disposing of another’s goods? And whoever detains another man’s goods from him without cause takes upon himself the right of disposing of them.” The term “conversion” has, in truth, a technical and conventional meaning, which was originally given to it in order to make the action of trover applicable to what was more properly the subject of an action of detinue, and by this means prevent the defendant from availing himself of the right of waging his law, to which he was entitled in the

(a) 5 H. & N. 300.

(b) *Baldwin v. Cole*, 6 Modern Rep. 212.

latter form of action. By long practice it has been established that where one person withholds from another his goods without lawful reason or excuse, the action of trover lies. To that practice I think it better to adhere, than enter into an inquiry as to what the strictly accurate meaning of the word "conversion" is.

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POLLOCK, C. B.—I entirely agree with the opinion expressed by my brother *Martin*. The facts are shortly these.—The plaintiff was the buyer of some champagne, which was in the custody of the defendant who was a wharfinger. Having bought the champagne and obtained a warrant for it, the plaintiff sent his clerk with the warrant to the defendant's wharf to obtain a sample of the wine. The defendant attorned to the warrant and gave a sample; and subsequently he gave another. He had thus ample means of knowing that the plaintiff had bought the champagne, had taken samples of it, and was entitled to have the bulk when he demanded it. When, however, the plaintiff demanded the bulk, he was informed by the defendant that a foreign attachment had issued from the Court of the Lord Mayor against this champagne, and, when he urged that the defendant knew it to be his property, the defendant told him, in effect, that he would not give it up, and that he required time for consideration on account of this process.

Now, the law has been long established, that when a man knows or has the means of knowing that goods are the property of another, and declines to give them up, he is liable in an action of trover for the conversion. Then the plaintiff also complains that the defendant wrongfully deprived him of the use of these goods. Now, that the defendant deprived him of the use of the goods is undoubted. Did

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he do so wrongfully? Certainly: for when the plaintiff went with the warrant and demanded his goods, the defendant would not give them up. The plaintiff is therefore, in my opinion, entitled to recover. I regret that my brother *Bramwell* is of a different opinion, but, as the majority of the Court are in favour of the plaintiff, the rule must be discharged.

BRAMWELL, B., added.—If the view which I take of the facts had coincided with that of the Lord Chief Baron, I might perhaps have been of the same opinion.

April 29.
May 4.

DELL v. KING.

A deed of composition, under the Bankruptcy Act, 1861, contained a covenant that if any creditor should sue the debtor, unless and until default should be made in meeting a maturity bills of exchange and promissory notes given as a security for the composition, the debtor's estate and effects should be thenceforth absolutely released and discharged from the debt.—*Held*, that the covenant was unreasonable and void, and could not be rejected; and consequently the deed was not binding on creditors who did not assent to it.

THE writ in this case issued on the 16th January, 1863; and on the 4th of February the plaintiff declared for goods sold and delivered.

Plea, dated 27th of February, 1863.—That after the commencement of this suit, to wit, on the 13th day of February, 1863, the defendant made his deed, dated the 13th day of February, 1863, being a deed expressed to be made between the defendant of the first part, J. Withers of the second part, and the several persons, companies, and partnership firms, whose names and seals were set and affixed to the schedule thereto, being respectively creditors of the defendant, and all other creditors of the defendant of the third part: reciting, &c.—(The plea then stated the recitals and covenant not to sue until default in meeting the bills of

absolutely released and discharged from the debt.—*Held*, that the covenant was unreasonable and void, and could not be rejected; and consequently the deed was not binding on creditors who did not assent to it.

exchange or promissory notes at maturity, hereinafter fully set forth in the replication, p. 87.)—Averments: that a majority in number representing three-fourths in value of the creditors of the defendant, whose debts respectively amounted to 10*l*. or upwards, in writing, assented to and approved of the said deed. And the deed was executed by the defendant and the said J. Withers respectively; and the execution of the said deed by the defendant was attested by an attorney and solicitor, and within twenty-one days from the day of the execution of the said deed by the defendant, the same was produced and left, having been first duly stamped, at the office of the Chief Registrar of her Majesty's Court of Bankruptcy for the purpose of being registered, and together with the said deed there was delivered to the said Chief Registrar an affidavit by the defendant that a majority in number representing three-fourths in value of the creditors of the defendant whose debts amounted to 10*l*. or upwards, had in writing assented to or approved of the said deed. And the said deed before registration bore such stamp duties as are required by the said Act. And the said deed was then and before the pleading of this plea duly, in the manner provided by the said Act, registered in the said Court. And the defendant has always been ready and willing to deliver to the plaintiff such securities as provided by the said deed. And before the pleading of this plea, the defendant within due time tendered and offered the same to the plaintiff, and the plaintiff then refused to accept the same. And everything has been done and has happened to make the said deed binding upon the plaintiff in respect of the claim herein pleaded to.

Replication.—That the said supposed deed in the said plea mentioned, was and is in the words, letters, and figures following, that is to say: "This indenture made the 13th day of February, 1863, between John King, of, &c., draper

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and grocer, of the first part, Jabez Withers, of, &c., tanner, of the second part, and the several persons, companies and partnership firms whose names and seals are set and affixed in the schedule to these presents, being respectively creditors of the said J. King, and all other the creditors of the said J. King, of the third part: Whereas the said J. King has for some time past carried on the trade or business of a draper and grocer at Stokenchurch aforesaid. And whereas the said J. King being indebted to divers persons in divers sums of money, and being unable to pay in full, he, on the 27th day of January, 1863, called a meeting of his creditors, and proposed to pay to them a composition of 7s. 6d. in the pound upon the amount and in full discharge of their respective debts, such composition to be paid in two equal instalments of 3s. and 9d. each, at the respective periods of four calendar months and eight calendar months from the 2nd of February, 1863, and to be secured by the said J. Withers. And where as the said "parties hereto of the third part (hereinafter referred to as the said creditors)" approve of the said proposal. And whereas the several parties to these presents have agreed to carry out the said proposal by the execution of these presents with such covenants and provisoes as are hereinafter contained. And whereas in part pursuance of the said proposal the said J. King has accepted bills of exchange drawn upon him by the said J. Withers, or they have respectively signed joint and several promissory notes, dated respectively the 2d day of February, 1863, for the payment to the said creditors respectively of the said two instalments of the said composition at the respective periods of four calendar months and eight calendar months from the 2d day of February, 1863, and the said respective bills of exchange or promissory notes have been delivered to the said creditors respectively as they do hereby respectively acknow-

ledge: Now this indenture witnesseth, that in pursuance of the said agreement and in consideration of the premises the said creditors do hereby severally for themselves and their respective heirs, executors and administrators, and successors, covenant with the said J. King, his executors and administrators, in manner following (that is to say): That unless and until default shall be made in meeting any of the said bills of exchange or promissory notes at maturity, they the said creditors respectively will not, nor shall their respective heirs, executors, or administrators, partners, partner or successors, sue, arrest, attach, or impede or molest the said J. King, his heirs, executors, or administrators, estate or effects, in any manner howsoever, or on any pretence whatsoever. And further that if any of them the said creditors, or any of their heirs, executors, or administrators, partners, partner or successors, shall break or contravene the said covenant in any manner whatsoever, then and in such case the said J. King, his heirs, executors, and administrators, estate and effects, shall be thenceforth absolutely released and discharged from all and singular the debts, claims, and demands of the creditor or creditors, person or persons, so breaking or contravening such covenant, and these presents shall and may accordingly operate as a defeazance pleadable in bar to, or may otherwise be set up as a defence to any action or actions, suit or suits, or other proceedings at law or in equity theretofore or thereafter brought, instituted or taken by or on behalf of such creditor or creditors, person or persons, or his, their, or any of their heirs, executors, or administrators, partners, partner, or successors for or in respect of such debts, claims, and demands, or any part of them. And (without prejudice to the aforesaid covenant) the said creditors do hereby, for the considerations aforesaid, severally for themselves and their respective heirs, executors, administrators, and successors, covenant

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with the said J. King, his executors and administrators, that if and when the said composition shall be fully paid to all the said creditors, then and in such case the said J. King, his heirs, executors, and administrators, estate and effects, shall be thenceforth absolutely released and discharged from all and singular the debts, claims, and demands of all the said creditors and their respective heirs, executors and administrators, partner, partners and successors, and these presents shall and may accordingly thenceforth operate as a defeazance pleadable in bar to, or may be otherwise set up as a defence to any action or actions, suit or suits, or other proceedings at law or in equity theretofore or thereafter brought, instituted or taken by or on behalf of the said creditors, or any of them, their or any of their heirs, executors or administrators, partners, partner, or successors, for or in respect of such debts, claims and demands, or any of them.—(Then followed provisions not material to the present question.)—And it is hereby lastly agreed and declared that these presents are intended to be and shall (so far as lawfully may be) operate as a composition deed within the meaning of the provisions of the Bankruptcy Act, 1861, in that behalf. In witness," &c.

Demurrer, and joinder therein,

Phipson, in support of the demurrer.—The deed is a good deed of composition under the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), and the covenant not to sue is pleadable in bar of the action. The case is distinguishable from *Oppenheimer v. Grieves* (a). There the creditors, parties to the deed, granted to the defendant "full, free and absolute liberty and license to conduct and manage his business and affairs for the period of fifteen calendar months," and they covenanted that they would not during that period "sue,

(a) 7 H. & N. 533.

arrest, prosecute, impede or molest the defendant in the management of his said business or affairs." There was no breach of that covenant as the plaintiff did not "sue" the defendant after the deed was executed, for the action was commenced before; neither did the plaintiff, by continuing the action, impede or molest the defendant *in the management of his business or affairs*. Here the creditors covenant that they will not "sue, arrest, attach, or impede or molest" the defendant, "unless and until default be made in meeting any of the bills of exchange or promissory notes at maturity." The continuance of this action is a molesting within the meaning of that covenant. [*Bramwell*, B.—If the defendant had served the plaintiff with a notice to reply, could it be said that the delivery of a replication was a molesting.] The plea states that the defendant offered to deliver the securities to the plaintiff and that he refused to accept them. [*Martin*, B.—Suppose the defendant had given them to the plaintiff, would that have amounted to a statutory accord and satisfaction of the debt? *Bramwell*, B., referred to *Evans v. Powis* (a).] An agreement between less than the whole body of creditors to accept a composition, is binding on those who are parties to it: *Norman v. Thompson* (b). It is clear, therefore, that if the plaintiff had executed the deed, he would have been bound by it, whether valid or not, under the Bankrupt Law. Then if this covenant is void it may be rejected, and the deed will be binding on the plaintiff although he has not executed it, because all the requisites of the Bankrupt Law Consolidation Act, 1860, have been complied with. In *Macnaught v. Russell* (c) it was held that creditors who were not parties to the deed could not object that a covenant not to sue was unreasonable. That case is an authority that even if the covenant objected

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(a) 1 Exch. 601.

(b) 4 Exch. 755.

(c) 1 H. & N. 611.

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to is void, the remainder of the deed may nevertheless be good. There is no reason why the non-executing creditors should not be bound by all valid stipulations. The decision in *Legg v. Cheesebrough* (a) proceeded on the ground that the clause in question was in its very nature merely personal to the individual creditors who chose to sign the deed, and inapplicable to the creditors in general.—He also referred to *Le Bret v. Papillon* (b).

Inderwick, for the plaintiff.—The plea is bad on the authority of *Oppenheimer v. Grieves* (c). First, the alleged matter of defence having arisen after action brought, ought to have been pleaded in bar of the further maintenance of the action ; in which case the plaintiff might have confessed the plea and obtained his costs up to the time of pleading it: Plead. Reg. Gen. Hil. T. 1853, r. 22, 23. [*Bramwell*, B.—The plea states that the deed was made after the commencement of the suit. No formal defence is necessary.] Secondly, the deed is not binding, under the 192nd section of the Bankruptcy Act, 1861, upon those creditors who are not parties to it. In order to be binding, it must be a deed which all the creditors may reasonably execute : *Woods v. Foote* (d). This covenant is unreasonable and void, for, in effect, it provides that if any creditor shall sue the debtor unless and until default shall be made in meeting any of the bills of exchange and promissory notes at maturity, the debtor and his estate and effects shall be thenceforth absolutely released from all debts, claims and demands of the creditor. Such a provision deprives a creditor, who has not executed the deed, and whose debt is disputed either in the whole or in part, from bringing an action to establish his right. If he sued the debtor before the bills or notes became due,

(a) 5 C. B., N. S. 741.

(b) 4 East, 502.

(c) 7 H. & N. 553.

(d) 1 H. & C. 841.

that would be a release of the debt, even though the bills or notes, when due, were dishonoured: *Garner v. Chapman* (a). But a composition deed, to be binding on creditors who do not execute it, must provide for a distribution of the debtor's property, in which all the creditors may participate: *Ex parte Morgan* (b).

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Phipson, in reply.—*Gardner v. Chapman* is distinguishable, because there the clause provided that the bringing an action should be an absolute forfeiture of the debt. But assuming that the clause now objected to is void, there is no reason why non-executing creditors should not be bound by such stipulations as are reasonable.

Cur. adv. vult.

The judgment of the Court was delivered, in the following Michaelmas Vacation (December 7th), by

POLLOCK, C. B.—We are of opinion that the plaintiff is entitled to judgment. The plea set up a deed of composition under the Bankruptcy Act, signed by a sufficient number of creditors to bind non-executing parties (creditors of the bankrupt), of whom the plaintiff was one. The objection to the deed was, that it contained clauses by which the creditors covenanted not to sue the debtor till he made default in performance on his part, and that, if any creditor so sued, this deed might be pleaded as a release. It was argued for the plaintiff that this rendered the deed void. For the defendant it was said that at the utmost this covenant was void, and might be rejected, and the deed left good as a composition deed without it.

We think that the deed would have furnished a defence on that ground had the clauses objected to not been in it.

(a) 8 C. B., N. S. 317.

(b) 32 L. J., Bank. 15.

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But we think, although they are invalid, they cannot be rejected. The debtor has no right to make his creditor covenant; nor has he any right to subject him to a loss of his debt, if he thinks fit to contest the validity of the deed.

No such consequences follow in bankruptcy. The creditor may sue the bankrupt contesting the bankruptcy, and, if he fails, still prove for his debt. We think these clauses then invalid. Can they be rejected? We think not. The creditor has a right to have a deed presented to him for execution, which, when executed, will put no burthen on him to which he ought not to be subject. Further, if the clause is not such as is authorized by the statute, and the bankrupt and his surety lose the benefit of it, they may refuse to let a person take a benefit under it for which they do not get the return they stipulated for. But the deed cannot be good or bad at the option of the debtor. For these reasons we think the plaintiff entitled to judgment.

Judgment for the plaintiff.

April 30.

GIBBON v. BUDD.

A physician registered under the Medical Act (21 & 22 Vict. c. 90), who attends a patient professionally, and is not prohibited from suing by any bye-law of the College of Physicians, can recover his fees without an express contract.

DECLARATION against the defendant as executor of Henry Budd, deceased, for money payable for work and attendance by the plaintiff on the deceased, and on accounts stated between the plaintiff and the deceased, and between the plaintiff and the defendant, as executor of the deceased.

Plea.—Never indebted.

At the trial, before *Bramwell*, B., at the London Sittings in last Hilary Term, it appeared that the action was

can recover his fees without an express contract.

The presumption is not, as formerly, that he attends the patient for an honorarium, but for fees, the right to which can be enforced by action.

brought by the plaintiff, a member of the Royal College of Physicians, London, and duly registered under the provisions of "The Medical Act" (21 & 22 Vict. c. 90), against the defendant, as executor of Henry Budd, to recover twenty guineas for twenty professional visits alleged to have been paid by the plaintiff to the deceased during the year 1861.

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The defence was, that the visits had either never been paid at all, or that, if they had in fact been paid, they were of a purely friendly character, and in no way professional. It was further contended by the defendant's counsel, as matter of law, that, even if the jury should be satisfied that the alleged visits had been paid as ordinary professional visits, inasmuch as there was no evidence of an express contract, the action was not maintainable.

The learned Judge reserved leave to the defendant to move on this point to enter a nonsuit, and left to the jury the question whether the plaintiff did, as he contended, attend the deceased as a physician, or, as the defendant contended, did not attend the deceased at all, or not in a professional character.

The jury found a verdict for the plaintiff for the sum claimed.

Lush, in last Hilary Term, obtained a rule nisi accordingly, upon the ground that by law a physician cannot, as such, recover fees for advice without a special contract, and that there was no evidence of such a contract.

Parry, Serjt., and *H. T. Cole* shewed cause (April 24).—It is conceded that if the Medical Act, 21 & 22 Vict. c. 90, had not passed, the plaintiff could not have maintained any action for the recovery of his fees, but that Act has enabled him to do so. By section 15, every person possessed of any one or more of the qualifications described

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in Schedule (A.) of that Act shall be entitled to be registered on complying with certain requisitions. The first head of qualifications described in Schedule (A.) is "fellow, licentiate or extra licentiate of the Royal College of Physicians of London. By the Act to amend the Medical Act, 22 Vict. c. 21, s. 4, the term 'member' shall be added after the term 'fellow' to the qualifications described in the first and second heads of Schedule (A.)" By the 31st section of the Medical Act, every person registered under it "shall be entitled according to his qualification or qualifications to practice medicine or surgery, or medicine and surgery, as the case may be, in any part of her Majesty's dominions, *and to demand and recover in any Court of law, with full costs of suit, reasonable charges for professional aid, advice, and visits, and the cost of any medicines or other medical or surgical appliances rendered or applied by him to his patients: Provided always, that it shall be lawful for the College of Physicians to pass a bye-law to the effect that no one of their fellows or members shall be entitled to sue in manner aforesaid in any Court of law; and thereupon such bye-law may be pleaded in bar to any action for the purpose aforesaid commenced by any fellow or member of such college.*" By section 32 no person shall be entitled to recover any charge in any Court of law for any medical or surgical advice, &c., unless he shall prove upon the trial that he is registered under this Act. In pursuance of the Medical Act, the College of Physicians of London have passed a bye-law that "no *fellow* of the College shall be entitled to sue for professional aid rendered by him." The plaintiff has been registered under the Act as a *member* of the College of Physicians, and therefore the restriction proposed by the bye-law on *fellows* does not apply to him. But even if it did it should have been pleaded in bar of the action. The object of the statute was to enable physicians,

as well as other medical and surgical practitioners, to recover reasonable charges for their professional aid, unless the College of Physicians should pass a bye-law prohibiting their fellows or members. The language of the proviso in the latter part of the 31st section is "sue in *manner aforesaid*," referring to the right to sue conferred by the former part of the section. By the bye-law, the College seems to have contemplated two classes of physicians, "fellows," who are only entitled to an honorarium, and "members" who by the Act may recover their reasonable charges. Before the Medical Act a physician might have recovered upon an express contract to pay him for his professional services: *Veitch v. Russell* (a). Now, he may have reasonable charges, where before he was only entitled to an honorarium, unless prohibited by any bye-law of the College of Physicians.

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Lush and *Dowdeswell*, in support of the rule.—The action is not maintainable. The true construction of the sections which have been referred to will be apparent, if the general scope and intention of the Medical Act be regarded. The primary object of the legislature was the registration of qualified practitioners in medicine and surgery. This object appears in the title and preamble, as well as throughout the body of the enactment. The Act is entitled, "An Act to regulate the qualifications of practitioners in medicine and surgery." The preamble recites that "It is expedient that persons requiring medicine should be enabled to distinguish qualified from unqualified practitioners." By section 32, no person, whether physician, surgeon, or apothecary, can, without proof of registration, recover any charges for professional advice. By section 31, every person who is registered, may sue *according to his qualification*. In other

(a) 3 Q. B. 928.

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words, every such person is remitted to his rights, as they existed, anterior to the statute. The Act operates, not to enable a physician to sue where previously he could not, but to incapacitate him from suing unless he complies with its requisitions. But prior to the statute, it is clear this action must have failed. A physician was not, indeed, like a barrister, under any incapacity to sue, but practised according to usage for an honorarium. Thus the presumption arose, that the parties were acting according to the usage, and, unless it was rebutted, no action could be maintained: *Chorley v. Bolcot* (a), *Kennedy v. Broun* (b). By evidence of an express contract, it might, no doubt, be rebutted: *Veitch v. Russell* (c); but here there was no such evidence. The plaintiff must argue that the Act makes a contract, where the parties do not desire it; since, independently of the statute, if the parties desired to contract, it would be competent for them to do so. But if what the legislature intended was, that a promise should be implied from the mere fact of professional attendance, that intention should have been clearly expressed. Again, if the operation of the 31st section be not restricted in the mode suggested, the province of each branch of the profession will be open to invasion. The uniform policy of the legislature has been to keep each branch distinct, and to confine them within their special departments: *Allison v. Haydon* (d). In *The Attorney General v. The Royal College of Physicians* (e), Vice Chancellor Wood points out, that the construction of the 31st section, for which the defendant now contends, may be the true construction; viz., reddendo singula singulis, that every person, who is registered, shall be entitled to recover according to his qualification. As to the

(a) 4 T. R. 317.

(b) 13 C. B., N. S. 677.

(c) 3 Q. B. 928.

(d) 4 Bing. 619.

(e) 1 J. & H. 596.

proviso, its object may be, to enable any College of Physicians to prevent their fellows or members from making express contracts with their patients.

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POLLOCK, C. B.—I am of opinion that this rule should be discharged. The meaning of the 31st section is clear from the language of the proviso. That section enacts, that all persons who are registered may practise according to their several qualifications, and sue for a reasonable remuneration; but with regard to physicians, it provides, that this shall not prevent any College of Physicians from prohibiting their fellows or members from demanding a fee. The object of the section is, to set at rest all doubt as to the right of a physician to recover his fees, but to enable the fellows of the College, if they desire that the dignity of their body should be preserved by practising for an honorarium, to effect this by a bye-law. This construction gives sense to the entire clause, and makes the whole scope of the enactment consistent.

The present action is brought to recover fees as a physician. The jury have found that the plaintiff was not practising gratuitously as a friend, but professionally, in the expectation of a fee. Undoubtedly, the general understanding formerly was, that a physician practised in the expectation of an honorarium, not of a remuneration, which he could demand as a legal right. The presumption was that the practice was in this sense gratuitous. This presumption is now reversed. A physician registered under the Medical Act, is, in the absence of a distinct understanding to the contrary, entitled to be paid for professional practice, if not restrained by a bye-law of the College of Physicians. The rule must therefore be discharged.

MARTIN, B.—I am of the same opinion. The question here was one of fact for the jury. There can be no doubt that,

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notwithstanding the Medical Act, it is competent for a physician, if he pleases, to attend a patient without being entitled to remuneration. If, therefore, the jury find that the understanding between the parties was that the attendance was to be gratuitous, no payment can be enforced. In this respect, the Act has made no alteration. According to the case of *Veitch v. Russell* (a), the state of the law prior to the Medical Act was, that a physician might bargain with his patient for a compensation in money; but, as it was not the conventional practice among physicians to receive this compensation as a right, no inference could be drawn, from the mere fact of attendance, that there was any contract for payment.

What then is the effect of the Medical Act? I will read the 32nd section before the 31st, since Mr. *Lush* contends it should be so read. [His Lordship read the 32nd section.] That section contains an absolute prohibition against the recovery in a Court of law of any charge for medical or surgical advice or attendance, or for medicine, except upon proof of registration. The Apothecaries' Act made it incumbent upon an apothecary to give similar proof of his certificate before he could recover. The 31st section contains a further prohibition. It provides, that the College of Physicians may pass a bye-law to prohibit their fellows or members from suing, and that such bye-law may be pleaded in bar; so that, if such a bye-law be passed, they cannot sue. I now come to the enabling part of the 31st section, which refers to all persons registered under the Act, except persons so prohibited. It enacts that, "Every person registered under this Act shall be entitled, according to his qualification or qualifications, to practise medicine or surgery, or medicine and surgery, as the case may be, in any part of her Majesty's dominions, and to demand and recover in any Court of law, with full costs of suit, reasonable charges for

(a) 3 Q. B. 928.

professional aid, advice and visits, and the costs of any medicines or other medical or surgical appliances rendered or supplied by him to his patients." The meaning of the section is clearly this. Hitherto a physician could not recover his fees: if registered, he may now do so. If he can satisfy a jury that, when he attended the patient, both parties understood that his charges for professional aid and advice were to be paid, he is entitled to recover reasonable charges by the express words of the enactment. This the jury have in substance found. I am, therefore, of opinion that the plaintiff is entitled to recover.

BRAMWELL, B.—I am also of opinion that the plaintiff is entitled to recover. At the trial, the contention for the plaintiff was, that he attended the deceased as a physician, and that, under the 21 & 22 Vict. c. 90, he was entitled to recover his fees as an ordinary debt. The contention for the defendant was, that the plaintiff did not attend the deceased at all; or, if he did, that it was as a friend, and not as a physician. But further, that if the plaintiff did attend as a physician in the expectation of employment, that his fees were a mere honorarium, and could not be demanded as of right, and that the Medical Act had not altered the legal position of a physician in this respect. The question of fact which I submitted to the jury was, whether the plaintiff did, as he contended, attend the deceased as a physician, or, as the defendant contended, did not attend him at all, or only in the character of a friend. The jury disposed of this question in the plaintiff's favour; finding, in effect, that the plaintiff gave his attendance upon the ordinary terms of a physician.

The question of law, which we have now to determine, is whether a physician has under such circumstances a mere right to an honorarium, or, by the operation of the Medical

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Act, a right to recover his fees, which he can enforce in a Court of law.

In the case of *Veitch v. Russell* (a), Lord Denman has clearly stated what the legal position of a physician was in relation to his fees before this Act passed. It was competent for the physician to stipulate, that if he attended the patient it must be upon the terms that the patient undertook to pay his fees, as matter of contract which he could enforce. But if he did not do so, the presumption was that the physician attended in the expectation of an honorarium, and so far gratuitously that he had no legal right to enforce any payment. For the plaintiff it is contended that the 31st section of the 21 & 22 Vict. c. 90 has in this respect altered the legal position of a physician. On the part of the defendant this is denied for several reasons. First, it is said that an alteration of the law was unnecessary, since, as it was a mere presumption of law that there was no bargain between the parties which could be enforced, the parties could, by making such a bargain, rebut the presumption. Secondly, that the legislature has not made use of the most apt words to express such an intention. To do so the enactment as to physicians should have been, that the presumption that they attend their patients upon the terms that they are to have no legal right to remuneration which they can enforce shall no longer prevail, and that, in the absence of an express bargain to the contrary, such right shall be deemed to exist. Thirdly, that the words of the enactment cannot be read in their strictly literal sense, viz. that every registered person may practise and recover reasonable charges, since this would enable such person to recover reasonable charges, whatever agreement he might have made. Lastly, that the object of the proviso might be, to enable any College of Physicians to disqualify their fellows or members for the future from making contracts which could

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by law be enforced. These are cogent arguments, which I own have created some doubt in my mind.

I will now consider the arguments on the other side. It must be borne in mind that, prior to the passing of the Medical Act, it was a common expression, though not an accurate one, that "a physician cannot recover his fees." Bearing this in mind, we may read the 31st section thus:— "Every physician, surgeon and apothecary, registered under this Act, shall be entitled, according to his qualification or qualifications, to practise medicine and surgery, and to demand and recover in any Court of law reasonable charges for his professional aid." This must obviously be so, since "every person" necessarily includes "physicians, surgeons, and apothecaries." Then as to physicians the meaning will be, that the presumption which previously existed shall no longer apply. The defendant's argument involves this extreme difficulty that if, as he contends, that is not the true construction, the clause as applied to physicians has no meaning, and except as to physicians it can have no meaning at all, since as to other persons there was no necessity to enact that when registered they may recover their fees. Again, the proviso that any College of Physicians may pass a bye law to prevent their fellows or members from suing is not a substantive enactment, but a qualification of something which precedes, which can only be the enactment in the previous part of the section that physicians may sue.

For these reasons I am of opinion that, although the words of the section are, that "every registered person may sue," the meaning is, that the former presumption as to the relation between physician and patient shall cease, and that a physician, when registered, shall be, as to remuneration for his services, in the same situation as any other person. I think, therefore, that the plaintiff is entitled to recover.

Rule discharged.

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May 7.

WALLER, Administratrix of GEORGE WALLER, deceased, v.
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A railway Company is not liable for injury to the guard of a train, occasioned by the negligence of the "ganger" of the plate-layers in keeping the permanent way in proper repair and condition; the two servants being engaged in one common object, viz., the safe conduct of the passengers on their journey.

DECLARATION.—For that at the time of committing the grievances, &c., and in the lifetime of the said G. Waller, he was employed by the defendants as a railway guard, to take charge of and travel in certain carriages of defendants, wherein they carried passengers for hire, on a railway constructed by and belonging to the defendants, under the powers of the act of parliament relating to the said Company; nevertheless the plaintiff says that the said railway, at the time of the occurrence hereinafter mentioned, while the defendants were using the same for the conveyance of passengers for hire thereon in such carriages as aforesaid, was, by the neglect and default of the defendants, constructed unsafely, and with defective and improper materials, and out of repair, and in an unsafe and defective condition, and unfit for the purpose aforesaid, of which the defendants, at the time aforesaid, had notice, but of which the said G. Waller was ignorant; and by reason of the premises, whilst the said G. Waller was so employed by the defendants as such railway guard as aforesaid, and was, in the course of his said employment, in charge of, and travelling in certain carriages of the defendants, wherein they were carrying passengers on the said railway, part of the said railway broke and gave way, and thereby the carriage in which the said G. Waller was travelling, in pursuance of his said employment as aforesaid, was overturned, and the said G. Waller thereby grievously hurt, wounded, and injured, and by reason of the hurts, &c., the said G. Waller, immediately afterwards, and within twelve

calendar months next before this suit, died, whereby the plaintiff, who was the wife of the said G. Waller, and S. Waller, R. Waller, &c., who are the infant children of the said G. Waller, wholly lost the support and maintenance which they received from him in his lifetime, and were deprived of the means of living. And, therefore, the plaintiff, as administratrix as aforesaid, according to the form of the statute in such cases made and provided, brings this action for the benefit of herself and her said children.

Plea.—Not guilty.


At the trial, before *Martin*, B., at the Kent Summer Assizes, 1862, a verdict was taken by consent for the plaintiff, subject to the opinion of the Court on the following case:—

The deceased, G. Waller, was a railway guard in the employment of the defendants at weekly wages, and it was his duty, as such guard, to travel with and in the passenger trains worked by the defendants on the North Kent Railway, a line belonging to and worked by the defendants under the powers of the act of parliament relating to the South Eastern Railway Company.

In the course of such duty, while he was travelling in a passenger train of the defendants carrying passengers for hire on the above line, between Strood and Gravesend, on the 20th of March last, the train ran off the line and overturned the break-van in which he was, whereby the said G. Waller was killed on the spot.

It was admitted by the parties that the accident happened through the decayed condition of the trenails which fastened the chairs to the sleepers on the defendants' railway, and that it was the duty of the "ganger" of the plate-layers, a servant of the defendants, to see to and keep in proper repair and condition the permanent way by renewing such trenails as were decayed; that the "ganger" was

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a person of competent skill, and that through his neglect of duty the road became unsafe.

It was further admitted that the said G. Waller was killed by the train running off the line through the decayed condition of the trenails; that none of the directors, or officers, or servants of the Company knew of such defects; but the above-mentioned ganger ought to have known it, and it was negligence in him not to know it.


The question for the opinion of the Court is, whether the action is maintainable. If the Court shall be of opinion that it is maintainable, the verdict for the plaintiff is to stand; but, if the Court shall be of a contrary opinion, the verdict for the plaintiff is to be set aside, and a verdict entered for the defendants.

Shee, Serjt. (with whom was *J. Brown*), argued for the plaintiff (April 29th).—The action is maintainable. The other side contend that, as the deceased was a fellow servant of the “ganger,” in the same common employment of the defendants, the case falls within the principle laid down in *Priestley v. Fowler* (a). But, in order to exempt a master from liability, the servants must not only be in the same common employment, but also engaged on the same common work. In *Holmes v. Clarke* (b), *Pollock*, C. B., in the course of the argument, said: “It must not be assumed that in no case can a servant maintain an action against his master in respect of injury caused by a fellow servant. It would be quite consistent with the authorities if we were to hold that a footman might recover against his master in respect of injury arising from the neglect of the coachman or groom, the services being different.” [*Pollock*, C. B.—If the coachman by his negligent driving upsets the carriage,

(a) 3 M. & W. 1.

(b) 6 H. & N. 349. 357; in error, 7 H. & N. 937.

whereby the footman who was behind it is injured, he could maintain no action against the master; but, if the butler happens to be crossing the road and the coachman negligently drives over him, he might maintain an action against the master.] When a master employs a servant in a work of a dangerous character, he is bound to take all reasonable precautions for the safety of that workman: *Paterson v. Wallace* (a). A servant takes upon himself the ordinary risk of the service, arising from the carelessness or negligence of those who, in the same common employment, are engaged in the same common work; but he cannot be supposed to contemplate dangers arising from the negligence of those engaged in a different work; *Bartonshill Coal Company v. Reid* (b). All the authorities are collected and commented on in the *Bartonshill Coal Company v. McGuire* (c), where Lord Chelmsford, C., said: "It is necessary, however, in each particular case, to ascertain whether the servants are fellow-labourers in the same work, because, although a servant may be taken to have engaged to encounter all risks which are incident to the service which he undertakes, yet he cannot be expected to anticipate those which may happen to him on occasions foreign to his employment. Where servants, therefore, are engaged in different departments of duty, an injury committed by one servant upon the other, by carelessness or negligence in the course of his peculiar work, is not within the exception, and the master's liability attaches in that case in the same manner as if the injured servant stood in no such relation to him." That distinction was recognised and adopted in *Senior v. Ward* (d). Here the "ganger" of the platelayers, whose negligence occasioned the accident, was engaged in a different department of duty from that of the guard who was killed. Moreover,

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(a) 1 Macq. 748.

(b) 3 Macq. 266.

(c) 3 Macq. 300. 307.

(d) E. & E. 385.

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the defect in the rails was not one which the guard could know, so as to enable him to take precautions against it.

Lush argued for the defendants (May 4).—The Company having employed a person of competent skill, and the injury having arisen from his negligence, the case falls within the scope of the authorities commencing with *Priestley v. Fowler* (a). The principle of that decision is, that a servant is as competent to judge of the probability and extent of danger which he may incur as his master, and that he voluntarily undertakes the risk. It is said that in this case the two servants were not engaged in the same common work, but that is a fallacy. [*Pollock*, C. B.—They were engaged in the same common object, viz., the safe conveyance of the passengers to the end of their journey. The duties of the footman and the cook are not the same, but if the footman on going into the kitchen was scalded through the negligence of the cook, no action would lie against the master.] In *Hutchinson v. The York, Newcastle and Berwick Railway Company* (b), a servant of a railway Company, in discharge of his duties as such, was travelling in a train under the guidance of other servants of the Company through whose negligence a collision took place and he was killed; and it was held that no action was maintainable by his representatives against the Company. [*Pollock*, C. B.—This is like the case of a master having two carriages, and the one coachman by his negligence upsetting the other.] In *Wigmore v. Jay* (c) it was held that the defendant, a master builder, was not liable for the negligence of his foreman in the erection of a scaffold, whereby a workman was killed. In a note to the case of the *Bartonshill Coal Company v. McGuire* (d) reference is made to an American

(a) 3 M. & W. 1.

(b) 5 Exch. 343.

(c) 5 Exch. 354.

(d) 3 Maoq. 300. 316.

case, *Farrell v. Boston and Worcester Railway Corporation*, in which it was held that the Company were not liable for injury to an engine-man occasioned by the negligence of the switch-man in the management of the switches. In *Bartonshill Coal Company v. Reid (a)*, Lord Cranworth, C., said:—"Principle, therefore, seems to me opposed to the doctrine that the responsibility of a master for the ill consequences of his servant's carelessness is applicable to the demand made by a fellow-workman in respect of evil resulting from the carelessness of a fellow-workman when engaged in a common work." . . . "It is not necessary for this purpose that the workman causing, and the workman sustaining, the injury should both be engaged in performing the same or similar acts. The driver and the guard of a stage coach, the steersman and the rowers of a boat, the workman who draws the red-hot iron from the forge and those who hammer it into shape, the engine-man who conducts a train and the man who regulates the switches or the signals, are all engaged in common work." The law is stated in similar terms by Lord Chelmsford, C., in delivering his opinion in *Bartonshill Coal Company v. McGuire (b)*. In *McNaughton v. The Caledonian Railway Company (c)*, the deceased, while employed as a carpenter in repairing a railway carriage on a siding, was killed by a collision caused by an engine driving violently into the siding; so that in that case the two servants were not engaged in the same common work. In *Searle v. Lindsay (d)* the plaintiff, who was third engineer on board a steam-vessel, was injured by reason of a winch being in a defective and unsafe condition through the neglect of the chief engineer. [*Martin, B.*—In *Bartonshill Coal Company v. McGuire (e)*, Lord Broug-

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(a) 3 Macq. 266. 284. 295.

(d) 11 C. B., N. S. 429.

(b) 3 Macq. 300.

(e) 3 Macq. 300. 313.

(c) 19 Sess. Cas. sec. ser. 271.

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*ham* said: "To bring the case within the exemption, there must be this most material qualification, that the two servants shall be men in the same common employment, and engaged in the same common work under that common employment." That doctrine was recognised in *Gray v. Brassey* (a). In *O'Byrne v. Burn* (b) the injury resulted from the employment of an inexperienced workman.

*J. Brown* replied (c).—The first question is, what is an employment of fellow-servants on the same common work, so as to bring the case within *Priestley v. Fowler*. Is a ticket clerk engaged in the same common work with the driver of the train for which the tickets are issued? [*Martin, B.*—Suppose that whilst a ticket collector was standing on the step of a door collecting tickets, the train moved on through the negligence of the driver, whereby the ticket collector was injured, could he maintain an action against the Company?] He might, for he was engaged in a different duty and without any control over the engine driver. In like manner, a guard has no control over the "ganger" or the plate layers. [*Pollock, C. B.*—The test cannot be whether the one servant has control over the other; for if so, in the case of a ship, if the man at the helm did not understand the signals given by the signal man, and turned the vessel the wrong way, by which the sailors were injured, every one of them might maintain an action against the owner of the vessel.] At least the one servant must have knowledge or the means of knowledge of his fellow-servant's proceedings. In *Searle v. Lindsay* (d) the two engineers were engaged on board the same steam vessel, and had the same means of knowing

(a) 15 Sess. Cas. sec. ser. 135.

(b) 16 Sess. Cas. sec. ser. 1025.

(c) In the absence of *Shoe*,  
 Serjt. The Court observed that

he had no right to reply, but ex  
 gratia they would hear him.


(d) 11 C. B., N. S. 429.

the condition of the winch. A master is bound to take all reasonable precautions to secure the safety of his workmen: *Brydon v. Stewart* (a); and persons in the employment of a railway Company have a right to assume that due care has been taken to render the railway safe, unless they have the means of ascertaining that it is not. Secondly, the risk must be one which the servant voluntarily incurs when he enters the service. When a servant undertakes an employment which is necessarily hazardous, he only accepts the service subject to the risks which are incidental to it: *Holmes v. Clark* (b). [Pollock, C. B.—To render that case analogous, the guard ought to have called the attention of the directors to the fact that the rails were in an insecure condition. *Wilde*, B.—The rails being properly or improperly laid must necessarily be a risk incident to the employment of a guard.] In *Hutchinson v. The York, Newcastle and Berwick Railway Company* (c), and *Wiggett v. Fox* (d), the servants were engaged in the same common work.

*Cur. adv. vult.*

POLLOCK, C. B., now said,—I am of opinion that the verdict ought to be entered for the defendants. The question, in substance, is whether an action can be maintained by a servant of a railway Company for injury occasioned by the negligence of another servant of the Company. The plaintiff is the widow of a guard who, whilst in the employment of the defendants, was killed by a train running off the line in consequence of the negligence of a servant of the Company whose duty it was to take care that the plates of the railway were so fixed as to be perfectly safe and secure.

I think it unnecessary to review the authorities. The question resolves itself into this: whether the servant whose negligence caused the accident and the servant who was


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(a) 2 Macq. 30.

(b) 7 H. & N. 937.

(c) 5 Exch. 343.


(d) 11 Exch. 832.

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killed were at the time engaged in what may be called one common object. I think that the superintending the trains on their journey, and the taking care that the rails on which the carriages run are firmly and securely fastened and bolted constitute one common object, viz, that the passengers shall be conveyed in carriages which are safe and on rails which are free from danger. Where, indeed, two trains belonging to the same Company are travelling on different lines of rail which at a certain point intersect each other, or join a principal line, and in consequence of the negligence of the driver of one of the trains a collision ensues, by which the driver of the other train is injured, I own there seems to me less of what may be called an employment in one common object. No doubt the common object of the two servants is the driving their respective trains to their place of destination; but each of them has in particular a different object, one of them has one train under his controul, the other another train. But in this case the common object of both servants was the safe conveyance of the passengers in that particular train, it being the duty of the one to superintend the carriages, of the other to take care that the rails were in such a condition that the journey might be safely performed. Viewing this case with reference to the observations of Lord *Cranworth* in *Bartonshill Coal Company v. Reid* (a), that "when a workman contracts to do work of any particular sort, he knows or ought to know, to what risks he is exposing himself," there can be no doubt that the guard of a railway train must anticipate, among other probable sources of danger on the journey, the neglect of a servant to oil the wheels of the carriages, the neglect of another to adjust the points, the neglect of another to take care that the rails are safely and securely fastened and bolted. I think that this case falls within the principle laid

(a) 3 Macq. 284.

down for the first time in *Priestley v. Fowler* (a), which is not in my opinion opposed to any authority which has arisen out of it.


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MARTIN, B.—I believe that it was in consequence of a doubt entertained by me that judgment was not given at the conclusion of the argument. I certainly did think it a matter well worthy of consideration, and I think so still, whether this case falls within the rule laid down by Lord *Chelmsford*, C., in the case of the *Bartonshill Coal Company v. McGuire* (b), that “where servants are engaged in different departments of duty, an injury committed by one servant upon the other by carelessness or negligence in the course of his peculiar work, is not within the exception, and the master’s liability attaches in that case in the same manner as if the servant stood in no such relation to him.” Were I satisfied that Lord *Chelmsford*, when he speaks of servants engaged in different departments of duty, contemplated an engine driver or guard of a railway train as being engaged in a different service from that of a platelayer or other person employed to take care of the line, I should be less willing to concur in this judgment; but I have carefully read the case of the *Bartonshill Coal Company v. Reid* and the *Bartonshill Coal Company v. McGuire*, and also the judgment of the Chief Justice of the Supreme Court of Massachusetts in the case of *Farwell v. Boston and Worcester Railway* (c), whose observations are applicable to this case. Chief Justice *Shaw* commences his judgment thus, “This is an action of new impression in our Courts and involves a principle of great importance. It presents a case where two persons are in the service and employment of one Company whose business it is to construct and maintain a railroad

(a) 3 M. & W. 1.

(b) 3 Macq. 307.

(c) 3 Macq. 316; 4 Metcalf, 49.

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and to employ their trains of cars to carry persons and merchandise for hire. They are appointed and employed by the same Company to perform separate duties and services all tending to the accomplishment of one and the same purpose, that of the safe and rapid transmission of the trains; and they are paid for their respective services according to the nature of their respective duties and the labour and skill required for their proper performance. The question is, whether for damage sustained by one of the persons so employed, by means of the carelessness and negligence of another, the party injured has a remedy against the common employer." The Chief Justice then proceeds to discuss the subject with great ability, and the result is that he comes to the conclusion that the railway Company are not liable. I yield to that opinion, and concur in the judgment of the other members of the Court.

BRAMWELL, B.—I am also of opinion that the verdict ought to be entered for the defendants for the reasons already so fully stated by the Lord Chief Baron and my brother *Martin*. I think the case falls within the principle laid down in *Priestley v. Fowler*, and the subsequent authorities which have been cited. It is certainly governed by the criterion suggested by Lord *Chelmsford*, in *The Bartonshill Coal Company v. McGuire*, and by Chief Justice *Shaw* in the judgment referred to by my brother *Martin*, and it is also within the criterion given by the Lord Chief Baron, which I consider a very good one, viz., were the servants, at the time of the accident, engaged in *one common object*.

Judgment for defendants.

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## PAINTER and Others v. ABEL.

April 28.

**T**HE first count of the declaration stated that the defendant, by deed dated the 16th of June, 1860, covenanted to pay, or cause to be paid to the plaintiffs the sum of 420*l.*, with interest at the rate of 4*l.* 10*s.* per cent., on the 16th of December then next; averring that that period had elapsed before action, and alleging as a breach the nonpayment.

There was a second count for money lent, interest, and on accounts stated.

Pleas.—First: to first count, non est factum. Second: to second count, never indebted.—Issues thereon.

This action was tried before *Erle*, C. J., at the last Summer assizes for the county of Derby. The plaintiffs were the trustees of a friendly society at Eccleshall in the county of Stafford, and the defendant was a farmer residing at Salterwood, in the parish of Denby, in the county of Derby.

The substance of the evidence adduced for the plaintiffs, so far as it is here material, was as follows:—In June, 1860, the plaintiffs' attorney, who was in business at Eccleshall, received an application from Joseph Shaw, an attorney at Derby, with whom he frequently had business transactions, for an advance of 450*l.* for the defendant, whom Shaw represented as desirous of borrowing that amount upon a mortgage of certain land and houses belonging to the defendant at Denby. The plaintiffs being willing to advance 420*l.*, their attorney sent his clerk over to inspect the pro-

The defendant instructed his attorney S. to borrow 100*l.* upon the security of certain freehold estate, and gave him his title deeds to enable him to do so. S., professedly on behalf of the defendant, applied to the plaintiffs for a loan on mortgage, the amount of which was fixed at 420*l.* Thereupon, having forged a mortgage from the defendant to the plaintiffs, S. delivered it to the plaintiffs and received the 420*l.* He then represented to the defendant that he could not obtain the proposed advance, and afterwards lent him certain sums as his own money, taking a promissory note as security for

part, and a mortgage for the whole of the advances.—*Held*, that on these facts there was no evidence, as to any part of the 420*l.*, of an implied promise by the defendant to pay the plaintiffs, so as to support an action for money lent.

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perty and to obtain the title deeds from Shaw; and being satisfied by his clerk's report as to the value of the property, and having himself examined the title deeds, he assented on behalf of the plaintiffs to a loan of 420*l.*, to which amount Shaw agreed, professedly on behalf of the defendant. A draft mortgage was accordingly prepared by the plaintiffs' attorney, and forwarded to Shaw, by whom it was engrossed. On the 16th of June the plaintiffs' attorney met Shaw by appointment at Stafford. Shaw produced a mortgage deed, purporting to be executed by the defendant, and duly attested, and delivered it to the plaintiffs' attorney, who thereupon paid the sum of 420*l.* into Shaw's hands. Payment of the first half year's interest was received from Shaw when it became due. Subsequently, the interest having fallen into arrear, the plaintiffs' attorney applied by letter to the defendant for payment. The defendant wrote in reply stating that he had not been aware that Shaw had the money from the plaintiffs; but when shewn the deed he at first admitted his signature to be genuine.

The defendant was examined in support of his own case, and swore that he had never signed the deed. The effect of his evidence was as follows:—In June, 1860, he instructed Shaw to raise 100*l.* upon the security of his property at Denby, and for this purpose entrusted him with his title deeds. Shaw afterwards told him that he could not find anyone to make the proposed advance, and offered to lend him the money himself. The defendant, between the months of June and November, 1860, received various sums from Shaw by way of loan, amounting together to 198*l.*, and to secure these sums, and a balance for interest and costs, he, in November, 1860, gave Shaw a mortgage on his property at Denby for 225*l.* He had also, previously to executing this mortgage, given Shaw his promissory note as to one item for 100*l.* The first of these advances was made on the

28th of June; consequently after Shaw had received the 420*l.* from the plaintiffs. The defendant never heard of the plaintiffs' mortgage deed until long after he had received these advances from Shaw. His admission that the plaintiffs' mortgage was genuine arose from a confusion between that document and Shaw's mortgage. Shaw, who had been tried for this and other forgeries, to which he had pleaded guilty, corroborated the defendant's evidence. The defendant's account of the circumstances under which he received the 198*l.* was also borne out by a number of letters which he had received from Shaw at the time when the advances were made.

The plaintiffs' counsel contended that, even if the jury believed the deed to be a forgery, the plaintiff would be entitled to recover either the money which actually came into the hands of the defendant, or, at all events, to recover to the extent of Shaw's original authority.

His Lordship reserved leave to move to enter the verdict for the plaintiffs on the counts for money lent for 100*l.*, or for so much more as the Court might consider the plaintiffs were entitled to recover on that count, and left to the jury the question whether the deed was genuine or a forgery. The jury found a verdict for the defendant upon this question.

*Hayes*, Serjt., in Michaelmas Term, obtained a rule nisi to enter the verdict for the plaintiffs, on the count for money lent, for 198*l.* or 98*l.*, on the ground that, assuming the mortgage to be a forgery, the defendant was liable to the plaintiffs in respect of the loan and advance of the money, at all events to the extent of one or other of the above sums.

*Macaulay* and *Field* appeared to shew cause; but the Court called upon

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*Hayes*, Serjt., and *Wills*, to support the rule.—The plaintiffs are entitled to recover on the count for money lent at least to the extent to which the defendant originally authorized Shaw to borrow. It will be convenient first to examine the nature of Shaw's authority, and afterwards to deal with the question of excess in the *amount* borrowed. The authority to raise money on the proposed security was perfectly general as to the mode in which it was to be raised, and it would have been clearly within its scope to borrow on deposit of the title deeds a sum repayable on demand. Now, the advance was obtained by means of this general authority, and, there being no valid specialty security, the law will, it is submitted, imply a promise to repay on request. [*Martin*, B. —The advance was not obtained on a deposit of title deeds, but upon a forged mortgage security.] The intervention of a forged security cannot alter the simple contract rights of the parties, nor can it be material that by the terms of that document the period of repayment is deferred. In *The Bank of England v. Tomkins* (a), it was held that money advanced upon forged Exchequer bills might be recovered back in an action for money lent. An action in the same form was held to be maintainable, in *Yates v. Aston* (b), to recover money secured by a mortgage deed which contained no covenant for repayment of the sum advanced. [*Wilde*, B.—Here, in point of fact, Shaw did not borrow at all for the defendant, but obtained the money for himself.] The authority with which he was invested by the defendant enabled him to impose upon the plaintiffs and so to obtain the money. A principal, who gives an authority to his agent which enables him to defraud, ought to suffer by the fraud, rather than one who advances money on the faith that the agent pursues his authority. The case of *Perry v. Attwood* (c) illustrates a similar principle. Then, with

(a) 6 Jur. 347.

(b) 4 Q. B. 182.

(c) 2 De Gex &amp; J. 21.

regard to the excess of authority in the amount borrowed, it is clearly severable. The rule on this subject is thus laid down in Paley on Principal and Agent, p. 179, citing Co. Lit., 258, *b*:—"Where a man doth that which he is authorized and more, it is good for that which is warranted, and void for the rest." And the following illustration of the rule is given in 1 Bac. Abr., "Authority" (C), p. 436:—"Where an attorney has authority to make livery of Whiteacre, and makes livery of Blackacre and Whiteacre, there is no reason that what he hath done more should vitiate what he has done pursuant to his power." [*Bramwell*, B.—Suppose there had been no felony, and the fraud had been immediately discovered, could not the plaintiffs have recovered the whole 420*l*. from Shaw?] They might, no doubt, have elected to do so. On the other hand, it was competent for them to elect to treat 100*l*. as a loan to the defendant, and to recover the residue from Shaw as money had and received. It is said that in this view there would be two contracts. But that is not so. In such a case the action for money had and received does not rest upon contract, but upon the ground that the one party has wrongfully got possession of the other's money. But no action can be maintained *on the contract itself* against one who contracts merely as an agent, though without authority: Notes to *Thompson v. Davenport*, 2 Smith's Lead. Cas., p. 320. The doctrine that by the slightest excess of authority on the part of an agent the principal is altogether discharged, is unreasonable and opposed to the authorities.

POLLOCK, C. B.—I am of opinion that this rule should be discharged. The facts of the case are these.—Abel, the defendant, employed his attorney, Shaw, to borrow for him 100*l*. upon mortgage, and to enable Shaw to do this the defendant gave him his title deeds. Shaw, having forged a

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mortgage deed for 420*l.*, obtained that sum from the plaintiffs, and gave them in exchange the forged deed. He then represented to the defendant that there was a difficulty in procuring the advance, and thereupon he himself lent the defendant certain sums of money as his own, and, to secure these advances, the defendant gave him a promissory note and afterwards executed a genuine mortgage deed. The question is whether, in addition to his liability upon these securities, the law will imply a promise by the defendant to pay the plaintiffs the 100*l.* which Shaw was authorized to raise. It is true that in an action for money had and received the law will frequently imply a promise, where the circumstances are such as to enable the Court to administer a form of relief which partakes of an equitable character. But an action for money lent can only be founded upon an actual loan of money, and between the plaintiffs and the defendant there was no such contract. Shaw's authority was to raise money upon a security by deed. It was the business of the plaintiffs to see that the transaction was regular, and if they had done so no loss would have occurred. The facts of this case are not such as to support an action for money lent.

MARTIN, B.—I am of the same opinion. The plaintiffs allege that the defendant is indebted to them to the extent of 100*l.* upon a simple contract. And if so, they must give evidence of it. Now the evidence is, that the defendant, wishing to borrow 100*l.*, proposed to an attorney named Shaw to raise it for him by way of mortgage, and gave him his title deeds for that purpose. Shaw applied to the plaintiffs, and borrowed from them 420*l.*, a sum exceeding the amount which he was authorized to borrow upon mortgage by 320*l.*, and gave to the plaintiffs a document, which purported to be a valid mortgage deed, but which, in fact, was not signed by the defendant. The consequence is that the

proposed security fails. Moreover there is no evidence of any loan by the plaintiffs to the defendant upon simple contract. The defendant gave but one authority, and it was not pursued. The transaction between Shaw and the plaintiffs cannot be severed, for if it could there would be two contracts. If by a forced construction of the contract the Court were to hold this action maintainable, it would be most unjust to the defendant, who, having no answer to an action on the securities which he gave Shaw, would thus be compelled to pay this money twice over. The case, in my opinion, is clear.

BRAMWELL, B.—I am also of opinion that this rule should be discharged. The original transaction is clearly insufficient to establish the defendant's liability. The defendant never authorized Shaw to do that which he did, viz. borrow on a forged deed. It is argued, however, that it was within the scope of Shaw's authority to borrow without the execution of any deed, to the extent of 100*l.*, and that the borrowing more than 100*l.*, and giving a forged mortgage deed, was a mere excess of authority. It may be difficult to draw the line between cases in which there has been an excess of an authority which has been partly pursued, and cases where there has been an assumption of an authority of a different character. Thus, if a builder who is authorized to construct a bridge with three arches constructs it with five, the authority is not in such a case pursued at all. But in the instance which has been quoted, where the authority is to make livery of Whiteacre, and livery is made of Blackacre as well as Whiteacre, the authority as to Whiteacre is strictly pursued. In the present case, however, I do not think that the transaction is one which can be thus severed.

Another argument which was used was that the transac-

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tion might be rendered complete by the fact that the money afterwards came into the hands of the defendant. And I am disposed to think that if after Shaw had obtained the 420*l.* he had taken 100*l.* to the defendant, and stated that he had borrowed it from the plaintiffs for him, it would then have been in the option of the plaintiffs to adopt the transaction, and this action might have been maintained. But that was not the case. The defendant supposed that he was borrowing, not from the plaintiffs, but from Shaw, and he ultimately gave security to Shaw for the sums advanced. Whether, therefore, the original transaction be regarded or the ultimate result, the plaintiffs' case appears to me in every point of view to fail. Upon these grounds I am of opinion that the defendant is entitled to judgment.

WILDE, B.—I was not present during the whole argument, but so far as I have heard it I am of the same opinion. To a certain extent I accede to Mr. *Wills*' argument. There are, I think, many cases in which an agent may bind his principal, although he exceeds the definite authority which has been given to him, especially where the principal has furnished him with documents which are apparently vouchers of his authority. But the difficulty consists in applying the principle, for which the plaintiffs' counsel contend, to the facts of this case. There is throughout the transaction an absence of evidence from which the law will imply a loan by the plaintiffs to the defendant. The result of the first part of the transaction was, that Shaw having got certain documents into his possession by means of a fraudulent deed obtained money for himself. Thus independently of the technical objection that this, being a mortgage transaction, could not form the subject of an implied promise, it was a transaction in which Shaw did not borrow for the

defendant at all. Then, in the final result, the money which the defendant received, he received, not as the money of the plaintiffs, but from Shaw himself, and he gave Shaw security for it. I am therefore of opinion that the rule should be discharged.

Rule discharged.

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### HILL v. TUPPER.

May 1.

**DECLARATION.**—For that, before and at the time of the committing by the defendant of the grievances herein-after mentioned, the plaintiff was entitled to, and had and was possessed of, the sole and exclusive right or liberty to put or use boats on a certain canal, called the Basingstoke Canal, for the purposes of pleasure and to let the same boats for hire on the said canal for the purposes of pleasure. Yet the plaintiff says that, whilst he was so entitled and possessed as aforesaid, the defendant, well knowing the premises, wrongfully and unjustly disturbed the plaintiff in the possession, use and enjoyment of his said right or liberty, by wrongfully and unjustly putting and using, and causing to be put and used, divers boats on the said canal for the purposes of pleasure, and by letting boats on the said canal for hire, and otherwise for the purposes of pleasure. By means of which said premises the plaintiff was not only greatly disturbed in the use, enjoyment and possession of his said right and liberty, but has also lost great gains and profits which he ought and otherwise would have acquired from the sole and exclusive possession, use and enjoyment of his said right or liberty, and was otherwise greatly aggrieved and prejudiced.

An incorporated canal Company by deed granted to the plaintiff the sole and exclusive right or liberty of putting or using pleasure boats for hire on their canal.—*Held*, that the grant did not create such an estate or interest in the plaintiff as to enable him to maintain an action in his own name against a person who disturbed his right by putting and using pleasure boats for hire on the canal.

Pleas.—First: not guilty. Secondly: that the plaintiff

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was not entitled to, nor had he, nor was he possessed of, the sole and exclusive right or liberty to put or use boats on the said canal for the purposes of pleasure, nor to let the said boats for hire on the said canal for the purposes of pleasure as alleged.—Issues thereon.

At the trial, before *Bramwell*, B., at the London Sittings, after last Hilary Term, the following facts appeared:— Under the 18 Geo. 3, c. 75, the Company of Proprietors of the Basingstoke Canal Navigation were incorporated with perpetual succession and a common seal, for the purpose of making and maintaining a navigable canal from the town of Basingstoke, in the county of Southampton, to communicate with the river Wey in the parish of Chertsey, in the county of Surrey. The lands purchased by the company of proprietors, under their parliamentary powers, were by the Act vested in the Company.

By the 100th section of the Act it is enacted: “ That it shall and may be lawful for the owners and occupiers of any lands or grounds adjoining to the said canal, *to use* upon the said canal *any pleasure boat or boats*, or any other boat or boats, for the purpose of husbandry only, or for conveying cattle from one farm, or part of a farm or lands, to any other farm or lands of the same owner or occupier, without interruption from the said Company of proprietors, their successors or assigns, agent or agents, and without paying any rate or duty for the same; and *so as such boat or boats be not* above seven feet in breadth, and do not pass through any lock to be made on the said navigation, without the consent of the said company of proprietors, their successors or assigns, *or be employed for carrying* any goods, wares or merchandize to market or for sale, or *any person or persons for hire*; and so as the same shall not obstruct or prejudice the said navigation, or the towing paths, or obstruct any boats passing upon the said navigation liable to pay the rates

or duties aforesaid ; and the owner of all such pleasure boats, or other boats, shall, in his own lands or grounds, make convenient places for such boats to lie in, and shall not suffer them to be moored or remain upon the said canal."

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The defendant was the landlord of an inn at Aldershot adjoining the canal, and his premises abutted on the canal bank. The plaintiff, who was a boat proprietor, also occupied premises at Aldershot on the bank of the canal, which he held under a demise from the company of proprietors, and by virtue of the demise claimed the exclusive right of letting out pleasure boats for hire upon the canal, which was the right the defendant was alleged to have disturbed.

The lease under which the plaintiff claimed this right was dated the 29th of December, 1860, and by it, in consideration of the rents, covenants and agreements therein contained, the said company of proprietors demised to the plaintiff, under their common seal, for the term of seven years from the 24th of June, 1860, at the yearly rent of 25l., "All that piece or parcel of land containing nineteen poles or thereabouts, adjoining Aldershot wharf, situate in the parish of Aldershot aforesaid, and the wooden cottage or tenement, boathouse, and all other erections now or hereafter being or standing thereon, &c." (describing the premises by boundaries, and by reference to a plan), "together with the appurtenances to the same premises belonging; *And also the sole and exclusive right or liberty to put or use boats on the said canal, and let the same for hire for the purposes of pleasure only.*" The lease contained various covenants framed with the object of preventing any interference by the plaintiff's pleasure boats with the navigation of the canal, and a proviso for re-entry for any breach of the covenants.

The evidence of the defendant was at variance with that adduced on behalf of the plaintiff upon the question whether



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the defendant had ever let out boats upon the canal for hire, in the sense of a direct money payment. The defendant did not deny that he kept pleasure boats, and used them upon the canal, but stated that he kept them for the use of his family; he admitted, however, that gentlemen had come from time to time to his inn and used these boats for fishing and bathing.

The learned Judge reserved leave to move to enter a nonsuit or verdict for the defendant, and left to the jury the question whether the defendant had obtained any pecuniary advantage from the boats. The jury found a verdict for the plaintiff; damages, a farthing.

*Hance*, on a former day in this Term, obtained a rule nisi to enter a nonsuit or verdict for the defendant on the ground, first, that the Company of Proprietors of the Basingstoke Canal Navigation had no power to grant the exclusive right claimed; secondly, that, if the grant were good, the action would not lie by the plaintiff against the defendant for the alleged infringement of the right: or for a new trial on the ground of misdirection by the Judge in directing the jury that the defendant was liable if he obtained any pecuniary advantage from the boats.

*Garth* and *Holl* shewed cause (April 29 and May 1).—The plaintiff's right having been infringed, an action lies for the infringement. The action is not without analogy. The grantee or lessee of a several fishery, or of a right of turbary, or other profit à prendre, may sue for a disturbance of his right. Here, too, the right claimed is one of profit. (The circumstance that the Company of Proprietors can sue in trespass is no reason for holding that the plaintiff has not also his right of action. The two causes of action are distinct, and the damage sustained is different. The right of the lord of a manor to sue for a trespass is no

impediment to the right of a commoner to sue for a simultaneous disturbance of his common. [*Martin*, B.—The plaintiff is setting up a right of a perfectly novel character. In *Keppel v. Bailey*(a) Lord *Brougham* said: “There are certain known incidents to property and its enjoyment; among others certain burthens wherewith it may be affected, or rights which may be created and enjoyed over it by parties other than the owner; all which incidents are recognized by the law. . . . But it must not, therefore, be supposed that incidents of a novel kind can be devised and attached to property at the fancy or caprice of any owner; . . . great detriment would arise, and much confusion of rights, if parties were allowed to invent new modes of holding and enjoying real property, and to impress upon their lands and tenements a peculiar character.”] The question here raised is not, as in *Keppel v. Bailey*, whether the owner of land can burthen it in the hands of future owners by the creation of novel rights. Nor is it necessary to contend that the plaintiff has an interest which he can assign without the assent of the company of proprietors. It is sufficient if he has such an interest as will enable him, as against a wrong-doer, to maintain an action. In *Whaley v. Laing*(b) the question was much discussed, whether a mere licensee of water was not entitled to maintain an action against any person by whom the water was polluted. Here the plaintiff was in the exercise and enjoyment of an exclusive right, given to him by the express terms of the demise. If the right conferred on the plaintiff had been the exclusive use of the grand stand at a race, or of seats at a window during a procession, he might, it is submitted, maintain an action against a mere intruder. [*Bramwell*, B.—Suppose that, in

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(a) 2 Myl. &amp; K. 535.

(b) 2 H. &amp; N. 476; in error, 3 H. &amp; N. 675. 901.

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the demise to the plaintiff power had been reserved to confer similar rights on nine other persons, and such rights had subsequently been conferred, could each of the ten maintain an action for an infringement of his right?] There, by the hypothesis, the right would not be exclusive. Some limitation may be necessary to prevent the creation of innumerable rights. But the use of water is a right well known and recognized. The claim of the plaintiff is to the exclusive use of water, or of land covered with water, for a particular purpose: the nature of the purpose can be no criterion of the existence of the right. [*Pollock*, C. B.—If the plaintiff's contention were correct, the number and variety of rights which might thus be created over land for a particular purpose would be infinite. The whole question depends on whether a new species of property can be created, or whether the alleged right merely exists in covenant.] In *Bostock v. The North Staffordshire Railway Company* (a), the opinions of the majority of the Court proceeded on the ground that the Company was created for a specific purpose, and was authorized to take and use lands for that purpose only. [*Martin*, B., referred to *Ackroyd v. Smith* (b).] There the owner and occupier of land claimed a right of way for purposes wholly unconnected with the use and enjoyment of the land. A grant by deed to a person, his heirs and assigns, of free liberty to hunt, fish, and fowl upon certain land, is not a mere personal licence of pleasure, but a grant of a profit à prendre: *Wickham v. Hawker* (c). Here there was a grant by deed to the plaintiff of the exclusive right to use the water with pleasure boats for his profit, and that being a right coupled with an interest entitled him to maintain an action against any person who infringed his

(a) 4 E. & B. 799.

(b) 10 C. B. 164.

(c) 7 M. & W. 63.

right. *Wood v. Leadbitter* (a) merely decided that the right to come and remain for some time on the land of another can be granted by deed only; and that a mere personal licence to do so, though money be paid for it, is revocable at any time without paying back the money. This is an incorporeal hereditament of a similar nature to the right to dig turves, or the liberty of hunting over the land of another, or fishing in his water.

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*Bernard* (with whom was *Montagu Chambers* and *Hance*), appeared in support of the rule, but was not called upon to argue.

POLLOCK, C. B.—We are all of opinion that the rule must be absolute to enter the verdict for the defendant on the second plea. After the very full argument which has taken place, I do not think it necessary to assign any other reason for our decision, than that the case of *Ackroyd v. Smith* (b) expressly decided that it is not competent to create rights unconnected with the use and enjoyment of land, and annex them to it so as to constitute a property in the grantee. This grant merely operates as a licence or covenant on the part of the grantors, and is binding on them as between themselves and the grantee, but gives him no right of action in his own name for any infringement of the supposed exclusive right. It is argued that, as the owner of an estate may grant a right to cut turves, or to fish or hunt, there is no reason why he may not grant such a right as that now claimed by the plaintiff. The answer is, that the law will not allow it. So the law will not permit the owner of an estate to grant it alternately to his heirs male and heirs female. A new species of incorporeal hereditament cannot be created at the will and pleasure of the owner of property;

(a) 13 M. & W. 838.

(c) 10 C. B. 164.

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but he must be content to accept the estate and the right to dispose of it subject to the law as settled by decisions or controlled by act of parliament. A grantor may bind himself by covenant to allow any right he pleases over his property, but he cannot annex to it a new incident, so as to enable the grantee to sue in his own name for an infringement of such a limited right as that now claimed.

MARTIN, B.—I am of the same opinion. This grant is perfectly valid as between the plaintiff and the canal Company; but in order to support this action, the plaintiff must establish that such an estate or interest vested in him that the act of the defendant amounted to an eviction. None of the cases cited are at all analogous to this, and some authority must be produced before we can hold that such a right can be created. To admit the right would lead to the creation of an infinite variety of interests in land, and an indefinite increase of possible estates. The only consequence is that, as between the plaintiff and the canal Company, he has a perfect right to enjoy the advantage of the covenant or contract; and, if he has been disturbed in the enjoyment of it, he must obtain the permission of the canal Company to sue in their name. The judgment of the Court of Common Pleas in *Ackroyd v. Smith* (a), and of Lord Brougham, C., in *Keppell v. Bailey* (b), are, in the absence of any case to the contrary, ample authority for our present decision.

BRAMWELL, B.—I am of the same opinion. I will only add, that the defendant cannot have the verdict entered for him on the plea of not guilty, for no leave was reserved at the trial; and the defendant could only succeed on that issue by obtaining a new trial on the ground of misdirection.

(a) 10 C. B. 164.

(b) 2 Myl. & K. 517. 535.

The rule must therefore be absolute to enter the verdict for the defendant on the second plea, unless the plaintiff elects to be nonsuited, but as he can never make a better case, the better course would be to enter the verdict for the defendant on the second plea.

Rule absolute accordingly.

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DUCKWORTH v. EWART.

May 6.


**DECLARATION.**—For that by a certain indenture sealed and made by the defendant, and bearing date the 23rd day of June, 1860, between W. Sharp and J. Williams of the first part, C. Willett of the second part, J. Bigham of the third part, E. Turner of the fourth part, The Liverpool Adelphi Loan and Discount Company of the fifth part, E. Ratledge and H. Ratledge of the sixth part, the defendant of the seventh part, M. Wilson of the eighth part, L. Jones and J. Conway of the ninth part, the plaintiff of the tenth part, and F. Horner of the eleventh part: after stating therein, amongst other things, certain claims of the said parties of the first, second, third, fourth

R., the owner of building land upon which he had erected some houses, mortgaged it first to a Building Society for 4300*l.*, with a power of sale in default of payment; secondly, to the defendant for 350*l.*, and afterwards to several other persons for various sums. R., being unable to proceed

with the building, by indenture, to which he, the Building Society, the defendant, and other mortgagees were parties, the premises were conveyed to the plaintiff in fee, discharged from all equity of redemption, but subject to the mortgage of the Building Society, in trust, in his discretion to sell the same, and out of the proceeds to pay, first expenses; secondly, the Building Society; thirdly, the defendant; fourthly, advances made by the plaintiff, and afterwards the other mortgagees in the order of their priority, with liberty for the plaintiff to raise a sum not exceeding 5000*l.*, for the purpose of carrying into effect the trusts of the indenture. The defendant covenanted that he would execute all assurances, reasonably required, for enabling the plaintiff to execute the trusts of the indenture. The plaintiff had made advances to the extent of 1150*l.* He had also arranged with the Building Society to accept 4100*l.* in satisfaction of their claim; and he had contracted for a loan of 5000*l.* on mortgage of the premises. The mortgage deed was prepared and all parties attended, when the defendant refused to execute it unless he was paid his debt of 350*l.*, and in consequence the Building Society sold the premises for 4510*l.*, which was not more than sufficient to pay their mortgage and expenses.

*Held*, that the plaintiff was only entitled to recover as damages the costs of the abortive mortgage: Per *Pollock*, C. B., and *Bramwell*, B.

Per *Martin*, B., that the plaintiff was entitled to recover, in addition to the costs of the abortive mortgage, the difference between 5000*l.* and the value of the land as building land; or at all events 900*l.*, the residue of the 5000*l.* after paying 4100*l.* to the Building Society.

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and fifth parts to the sum of '270*l.*, with interest thereon, charged upon certain premises the property of the said E. Ratledge and H. Ratledge, and which were assigned unto the plaintiff by the said indenture as after mentioned; and stating a certain mortgage, dated the 14th day of December, 1859, made by the said E. and H. Ratledge to certain trustees of the Permanent Benefit Building Society, of the said premises for securing the sum of 4300*l.* with interest, and other matters; and a certain mortgage dated the 15th day of December, 1859, made by the said E. and H. Ratledge, to the defendant of the said premises for securing the sum of 350*l.* and interest; and a certain mortgage, dated the 16th day of December, 1859, made by the said E. and H. Ratledge to the said M. Wilson of the said premises, for securing the sum of 100*l.* and interest; and a certain mortgage, dated the same day, made by E. and H. Ratledge to the said I. Jones and J. Conway, of the said premises, for securing the sum of 135*l.* and interest; and that a question had arisen as to whether the said parties of the first, second, third, fourth and fifth parts, were or were not bound to postpone their said claims to the said indentures or mortgages respectively: and stating that the said E. and H. Ratledge were indebted to the plaintiff in divers sums of money, and that the plaintiff had agreed to pay off the monies due to the said parties of the first, second, third, fourth and fifth parts; and also stating that the said E. and H. Ratledge being unable to complete the buildings and improvements which had been commenced by them upon the said premises, it was agreed by the said parties to the said indenture of the sixth, seventh, eighth, ninth, and tenth parts respectively that that indenture should be made; and in consideration that the plaintiff then paid to the said parties of the said first, second, third, fourth, and fifth parts the amount of their said claims respectively, and for

the other considerations therein mentioned, the said premises were by the said indenture conveyed unto and to the use of the plaintiff, his heirs and assigns, discharged from all equity of redemption, as in the said indenture mentioned, but subject to the said indenture of the 14th day of December, 1859, and to the payment of the monies intended to be thereby secured: Upon trust that the plaintiff should at his discretion sell the said premises, and out of the monies which should arise from any such sale as aforesaid, and by and out of the rents and profits of the said premises until the same should have been sold, in the first place pay the expenses incurred in and about the obtaining and executing of those presents and relating thereto, and in and about the same sale, and then pay off all the monies intended to be secured by the said indenture of the 14th day of December, 1859, and which should not then have been paid; and in the next place pay all the principal monies and interest which should be due to the defendant upon the security of the said indenture of the 15th day of December, 1859; and in the next place pay all the principal monies and interest which should be due in respect of the said advances so made by the plaintiff as aforesaid to pay off the said parties thereto of the first, second, third, fourth, and fifth parts, and all and singular the monies, costs, charges, and expenses which might be paid, expended, or incurred by the plaintiff in relation to a certain transfer therein referred to, or in or about the trusts or powers of the said indenture; and in the next place should pay all the principal monies and interest which should be due upon the securities of the said indentures of the 16th day of December, 1859, respectively, in the order and according to the priority of the execution of the same indentures respectively; and, lastly, pay the surplus (if any) of the said monies so to arise as aforesaid to the said E. Ratledge and H. Ratledge, their

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executors, &c., in equal shares. And it was by the said indenture provided that it should be lawful for the plaintiff to enter into possession of the said premises, and to finish any buildings which might be in the course of erection thereon, and also to erect any such other messuages, shops, or buildings as he should think fit, and to do all such things with respect to the said premises as he or they should think expedient; and that the monies expended by the plaintiff for the purposes aforesaid, or any of them, together with interest on the same at the rate of 5*l.* per cent. per annum, should be a charge upon the said premises. And in the said indenture it was by the parties thereto of the sixth, seventh, eighth, and ninth parts respectively declared that it should be lawful for the plaintiff to raise any money not exceeding in the whole the sum of 5000*l.* which should be required for carrying into effect any of the trusts or powers of the said indenture of mortgage of all or any of the said premises, and for the purposes aforesaid, or any of them, to execute and do all such assurances and things as the plaintiff should think fit, and any such mortgage should have priority over all the indentures of mortgage except the said indenture of the 14th day of December, 1859. And by the same indenture the defendant covenanted with the plaintiff, that the defendant *would execute and do all such assurances and things for enabling the plaintiff the better to execute the said trusts for sale and other the trusts and powers of the said indenture as by the plaintiff should be reasonably required*, and would postpone his said mortgage security intended to be made by the said indenture, and to any mortgage which might be created in exercise of the power in the said indenture contained and hereinbefore referred to.—Averments: that after the execution of the said indenture the plaintiff, in performance of the said trusts, caused to be finished the said buildings upon the said premises, and in so doing and otherwise about the said trusts, neces-

sarily expended divers large sums of money; and for the further performance of the said trusts and powers it became and was expedient and necessary to raise by mortgage of the said premises and buildings a large sum, to wit, the sum of 5000*l.*, and certain persons, to wit, Messrs. Woodruff & Ford were ready to advance the same on mortgage, and for the completion of the said mortgage it became and was necessary, and the plaintiff reasonably required, that a certain deed of mortgage, being an assurance within the meaning of the said covenant, should be executed, and that the defendant among others should be a party to and execute the same and postpone his said security to the security and mortgage so to be made: that before this suit the plaintiff reasonably required the defendant to be a party to and execute the same; and all conditions were performed and all things happened and all times elapsed necessary to entitle the plaintiff to a performance by the defendant of his said covenant and to maintain this action.—Breach: yet the defendant did not nor would, but altogether failed and refused to be a party to or execute the said deed of mortgage, or any deed whatever, and to postpone his said mortgage security to the said mortgage so to be made as aforesaid. By means whereof the plaintiff wholly lost the benefit which he would have derived if the defendant had been a party to and executed the said deed of mortgage; and the said loan on mortgage was lost and failed and could not be carried out, and the plaintiff became and still continues liable to pay out of his own means the said large sums of money expended and paid by him as aforesaid, and was and is unable to recover the amounts advanced by him as aforesaid, and was wholly unable to pay off the said mortgagees, under the said indenture dated the 14th day of December, 1859, at the time when the said mortgagees required and were entitled to payment thereof; and such last mentioned mortgagees thereupon, in pursuance of the

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powers vested in them in that behalf, proceeded to sell, and did sell, the said premises for a small sum of money and much less than the value thereof to the plaintiff, and the plaintiff was unable to stop or prevent such sale. And the plaintiff, and all the said parties having claims or interest in the said premises, besides the said last mentioned mortgagees, have wholly lost all the benefit which they otherwise would have derived from their securities upon and interest in the said premises.

Pleas.—First: non est factum.

Second.—That the defendant did execute and do all such assurances and things for enabling the plaintiff the better to execute the said trusts for sale, and other the trusts and powers of the said indenture, as by the plaintiff could be or were reasonably required; and did postpone his said mortgage security to the security intended to be made by the said indenture, and to any mortgage created in exercise of the power in the said indenture contained and therein referred to.


Third.—That the said deed of mortgage alleged in the declaration to have been requisite but not executed, was not reasonably required within the meaning of the covenant in that behalf.—Issues thereon.

At the trial, before *Martin*, B., at the last Liverpool Spring Assizes, the following facts appeared (as stated by *Martin*, B. in his judgment, *post*, p. 140).—Two persons, named Ratledge, had building land near Liverpool upon which they had erected houses. By a mortgage, dated 14th December, 1859, they had mortgaged the land to a Building Society for 4300*l*. By a second mortgage they had mortgaged it to the defendant for 350*l*. By another mortgage they had mortgaged it to a third mortgagee for 100*l*; and by a fourth mortgage they had mortgaged it to a Mr. Conway, an attorney, for 135*l*. They became unable to proceed with the building, and by an indenture, dated the 23rd of June,

1860, made between certain creditors of the first, second, third and fourth parts, the Building Society of the fifth part, Messrs. Ratledge of the sixth part, the defendant of the seventh part, the other mortgagees and the plaintiff and others of the other parts; it was recited that the builders were indebted to the various parties, including the plaintiff, in divers sums of money; that they were unable to complete the buildings, and it was agreed that the plaintiff should then pay certain of the creditors; that he should have power to sell the land, but subject to the mortgage to the Building Society, and out of the proceeds pay the expences, &c., the other mortgages, including the defendant's, and pay the surplus, if any, to the Messrs. Ratledge; and it was provided that it should be lawful for the plaintiff to enter upon the land and finish the buildings, &c., and that it should also be lawful for him to raise any sum, not exceeding 5000*l.*, for carrying into effect the trusts of the indenture and to secure the same by mortgage of the premises, which should have priority over all the mortgages, except that to the Building Society. And the defendant entered into a covenant with the plaintiff that he would execute any assurance which he might reasonably be required by the plaintiff to execute, in order to carry out the object of the indenture. After the execution of this indenture the plaintiff proceeded to execute its trusts, and expended upon the land, or made himself liable to the amount of 1150*l.* He also arranged with the Building Society to accept 4100*l.* in satisfaction of their debt, and contracted with certain persons for a loan of 5000*l.* upon mortgage of the land. A draft mortgage was prepared and approved by the solicitor of the defendant on his behalf and all other parties. The draft was engrossed and a meeting appointed to complete: all parties interested attended. The proposed mortgagees attended with the money. The persons who acted on

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behalf of the insurance Company attended to receive their debt. The defendant came, accompanied by his solicitors; but he refused to execute the mortgage, and the transaction went off. The result was that the Building Society acted upon a power of sale contained in their mortgage and sold the property at a forced sale for 4510*l.*, which was exhausted in paying their debt and their expenses. There was evidence at the trial, on behalf of the plaintiff, that the property for building purposes was worth 7530*l.*; on the other hand there was evidence on behalf of the defendant that it was only worth 4375*l.* It is admitted that the plaintiff is entitled to the verdict; but it was agreed at the trial that the damages should be settled by an arbitrator upon the principle laid down by the Court.

*T. Jones*, in the present Term, obtained a rule calling on the plaintiff to shew cause why the damages should not be reduced to 1*s.*, and why an arbitrator should not assess the damages accordingly, on the ground that the plaintiff is not entitled to more than nominal damages; against which

*Brett* (with whom was *Milward*) shewed cause (a).—The measure of damage which the plaintiff has sustained is the difference between the position in which he would have been if the defendant had performed his contract and the position in which the plaintiff now is. If the defendant had executed the mortgage deed, the plaintiff would have been the legal owner of property valued at 7000*l.* That, however, would have been mortgaged to the amount of 5000*l.*, but the plaintiff would have been enabled to pay to the Building Society 4100*l.*, which they agreed to accept in satisfaction of their mortgage debt of 4300*l.*, and then he would have had 900*l.*, with which he might have reimbursed himself for the advances he had made. The


(a) May 6. Before *Pollock*, C. B., *Martin*, B., and *Bramwell*, B.

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plaintiff is, therefore, entitled to recover, in addition to the costs of the abortive mortgage, the difference between the value of the estate and what it sold for; or the difference in its value, if free from the mortgage and power of sale of the Building Society; or, at all events, he is entitled to 900*l*. damages. [*Bramwell*, B.—If the premises were worth 7000*l*. at the time the defendant refused to execute the mortgage deed, they were of the same value afterwards for the purpose of raising money upon mortgage. Therefore, the only difference in the position of the plaintiff is that, whereas at the time the defendant broke his covenant, the plaintiff had obtained a mortgagee, he has now to find one. Suppose the plaintiff had sold the estate, got 10,000*l*. for it, and had paid off all the incumbrances, he would have sustained no damage from the defendant's breach of contract. Then do you say that it is the subject of special damage that the Building Society sold the estate for less than its value?] The damages to which the plaintiff is entitled are not confined to such as are the necessary consequence of the defendant's breach of contract, but embrace such damage as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the *probable result* of the breach of it: *Hadley v. Baxendale* (a); *Mayne on Damages*, p. 8. Here both parties knew that the Building Society had a mortgage on the estate, with a power of sale; and must have contemplated that they would exercise the power if their mortgage was not paid off. [*Martin*, B.—The direct consequences of the defendant's refusal to execute the mortgage deed was, that the plaintiff did not obtain the 5000*l*., and if he had obtained it, he would have had 900*l*. after paying off the mortgage of the Building Society; so that, in point of fact, the plaintiff has been deprived of 900*l*. by the defendant's breach of contract,

(a) 9 Exch. 341.

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It is like the loss upon a policy of insurance in the hands of a third person. *Bramwell*, B.—Though the plaintiff lost the 900*l.*, he had the estate.] If the defendant had performed his contract the plaintiff would have had the estate without the mortgage of the Building Society, who sold it for less than its value. [*Bramwell*, B.—Suppose the plaintiff had been a bare trustee without any beneficial interest, what would have been the damage resulting from the defendant's breach of contract? The plaintiff would clearly have sustained no damage from the bad sale of the property.]

*T. Jones*, in support of the rule.—The plaintiff is entitled to nominal damages only. Suppose the defendant, instead of covenanting to postpone his mortgage security, had covenanted to lend 350*l.*, could it be said that the damage now claimed would have been the natural consequence of his breach of that covenant, or such as might reasonably be supposed to have been in the contemplation of both parties? [*Martin*, B.—The direct consequence of the defendant's refusal to execute the deed was that the plaintiff did not get the 5000*l.*] The defendant did not covenant to execute a mortgage deed, in order that the plaintiff might obtain 5000*l.*, but to execute all assurances necessary to enable the plaintiff to sell the property. The plaintiff was empowered to raise 5000*l.*, and the defendant covenanted that it should have priority over his mortgage debt. The breach which alleges that the defendant refused to execute the mortgage deed, does not correspond with the covenant. In *Hanslip v. Padwick* (a) the defendant covenanted to demise to the plaintiff, on or before a certain day, a ferry, land and houses, and to deduce a good title thereto, and the plaintiff agreed to pay him 3150*l.* The plaintiff was promoter of a Company, provisionally registered, for working the ferry and building

(a) 5 Exch. 615.

bathing-houses, &c., and was also its solicitor. The defendant was unable to make a good title, in consequence of which the Company was dissolved. It was held that the plaintiff could not recover as damages the expense of raising the 3150*l.* and loss of interest; nor the expenses of preparing the Company's deed of settlement and registering it provisionally; nor the loss of profits from the granting of the lease and the establishment of the association; nor the profits he would have derived as solicitor of the Company; nor in respect of any advantage he might have derived from his time, labour, &c., bestowed in the formation of the Company. A plaintiff cannot recover as damages any loss which does not *wholly* arise from the defendant's breach of contract: *Gee v. The Lancashire and Yorkshire Railway Company* (a); *Le Peintre v. The South Eastern Railway Company* (b). Here the plaintiff's loss did not wholly arise from the defendant's refusal to execute the mortgage deed, but partly from the plaintiff not procuring another mortgage. In *Fletcher v. Tayleur* (c), Willes, J., suggested that the measure of damages for the breach of a contract to deliver a chattel should be governed by a similar rule to that which prevails in the case of a breach of a contract for the payment of money; and that as, in the latter case, whatever the amount of inconvenience sustained by the plaintiff, the measure of damage is the interest of the money only, by analogy, the measure of damage in the former case should be the average profit made by the use of the chattel. The loss of which the plaintiff complains is closely assimilated to the loss of profit which one party would have made if the other had performed his contract, which is too remote to form the subject of damage: *Wilson v. The Lancashire and Yorkshire Railway Company* (d). The defendant is not

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(a) 6 H. &amp; N. 211.

(c) 17 C. B. 21.

(b) Cited in 6 H. &amp; N. 215.

(d) 9 C. B., N. S. 632.



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the causa causans of the alleged damage, although he may be the causa sine quâ non of it. The plaintiff has, in fact, sustained no damage from the defendant's refusal to execute the deed, because that did not render the land less valuable. If the plaintiff had obtained the 5000*l.*, the land would have been subject to that charge; as it is, the plaintiff had the land without it. The damages here claimed are inadmissible on the ground of remoteness, as defined in *Mayne on Damages*, p. 14.

*Cur. adv. vult.*

The learned Judges having differed in opinion, the following judgments were delivered in Trinity Vacation (July 6).

MARTIN B.—This is to be a direction to an arbitrator upon what principle he is to assess damages.—(His lordship then stated the facts as above set forth, p. 134, and proceeded.)

First, I think the plaintiff is entitled to the costs of the proposed mortgage, which was rendered abortive by the breach of covenant of the defendant.

Secondly, I think the defendant liable for the difference between 5000*l.* and the value of the land as building land, such as it was contemplated to be by the indenture of 23rd June, 1860.

To ascertain what are the damages payable on a breach of contract, it is to be ascertained what is the object of the contract contemplated by the parties. The object in the present case was that the land should be dealt with as building land by the plaintiff. He was to finish and complete the building, and, as a means to enable him to do so, he was to borrow 5000*l.* on mortgage, and the defendant covenanted, in substance, to execute the mortgage deed. He refused to

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do so when the money was ready to be advanced. The consequence was that the Building Society acted upon the power of sale, of which I think the defendant not only must be taken to have, but of which he had, actual knowledge; and the land was taken out of the hands of the plaintiff, who was thereby utterly incapacitated from dealing with it in the manner intended by the indenture. It was therefore the direct and immediate consequence of the defendant's breach of covenant that the plaintiff was deprived of the land, and, as against the defendant, I think it must be taken to be of the value which the indenture contemplated it would have been if the 5000*l.* had been obtained; but it would have been burthened with a mortgage of 5000*l.*, and it therefore seems to me, that the direct and immediate damage to the plaintiff is the difference between that sum and the value of the land as contemplated by the indenture if the 5000*l.* had been obtained. It was said that the plaintiff might have procured the 5000*l.* from some other party, but of this there is no evidence. He had arranged to obtain it upon condition of the defendant being a party to the mortgage deed in accordance with his covenant, but the latter in breach of it refused to be such party, and there is no evidence, nor indeed any ground for supposing, that after what occurred at the meeting to complete, the plaintiff could have procured the 5000*l.* from any other quarter, unless at all events the defendant had been party to the mortgage, which he had already refused to be. This I think the direct and immediate damage to the plaintiff consequent upon the defendant's breach of covenant.

But damages may be estimated in various ways, and I think there is another view of this case which clearly entitles the plaintiff to 900*l.* The plaintiff, in execution of the trusts of the deed, had expended and rendered himself liable to the amount of 1150*l.* If the defendant had performed his cove-

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nant, the plaintiff would have been in possession of 5000*l*. Therewith, he would have been obliged to pay the Building Society 4100*l*., but the residue 900*l*., would have been by the terms of the indenture, applicable to reimburse himself against the 1150*l*. He was deprived of this by the defendant's breach of covenant, and, I own, it seems to me clear that 900*l* is a damage direct and immediately consequent by reason of it. But, in addition to this, I think if the arbitrator be of opinion that the land, if in the state contemplated by the indenture, would have been of a value exceeding 5000*l*., sufficient to enable the plaintiff to be paid the 1150*l* expended by him and the costs of the mortgage, he is entitled to them.

BRAMWELL, B.—The judgment which I am about to deliver, is that of the Lord Chief Baron and myself.

In this case it is desirable to state the facts, to shew the view of them on which our opinion is formed.—Persons named Ratledge were owners of land with unfinished buildings on them, subject to a first mortgage to a loan society, and to a second to the defendant. By a deed to which the Ratledges, the first mortgagees, the defendants, the others creditors, and the plaintiff were parties, it was covenanted and agreed that the plaintiff might find money to finish the houses, and might sell the premises, with power previously to mortgage them for not more than 5000*l*., subject to the first mortgage, and dispose of what he should receive by sale or mortgage in paying the first mortgagee, then himself for his advances, the defendant, the other creditors, and hold the surplus, if any, for the Ratledges. The defendant covenanted to execute any deed necessary to carry into effect any disposition of the property authorized by this deed. The plaintiff arranged with the first mortgagees that they should accept 4100*l* in full satisfaction of their debt.

He also procured persons to lend 5000*l.* on mortgage of the premises in question. These persons required the defendant to execute the deed of mortgage, which he was bound to execute, and which was approved by his solicitor. This, however, he refused to do at the last moment, unless paid his debt by the plaintiff. The plaintiff refused to do so; the intended mortgagees thereupon refused to advance the money. Afterwards the first mortgagees, in exercise of a power of sale, sold the property for a sum not more than sufficient to pay them and the expenses. There was evidence the property was worth much more than 5000*l.*, and that the sale was a bad one; and evidence that it was worth considerably less.

Whether the plaintiff sought for another mortgage, whether he offered a higher rate of interest, or whether he sought and offered in vain, having found the only persons who could be tempted by any rate of interest to lend anything on the property, did not appear, nor did it appear why he did not pay off the first mortgagees, and so prevent the disastrous sale; nor why he did not buy the estate; nor whether the bad sale was owing to the state of the money market, or to an absence of purchasers, owing to a wet day or a neighbouring race or other object of attraction; but it was said that the defendant, by his breach of contract, had caused a loss to the plaintiff of the difference between the 4100*l.* and the real value of the estate.

The action is brought for the defendant's breach of contract in not executing the intended mortgage, and we have decided that the defendant is liable to some damages. The question is what. We are of opinion only to the expense of the abortive mortgage. The defendant may be the *causa sine quâ non*, but is not the *causa causans* of the alleged loss. If the intended mortgagees had not insisted on the defendant's execution; if they had not had a power of sale;

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if they had not exercised it; if another mortgagee had been found; if the plaintiff had purchased; if the sale had been favorable, the loss would not have happened,—nay, if the plaintiff had paid the defendant his claim, 350*l*., it would not have happened. The defendant is not the cause of all these things happening and not happening. If this defendant is liable to these damages, so would the intended mortgagees be if the mortgage had gone off by their default. So would every intended lender of money, at all events, if he knew the purpose for which it was to be borrowed.

It is said that at all events he is liable for 900*l*., the difference between 4100*l*., and 5000*l*., which the plaintiff could have had certainly, and has certainly lost. But the former reasoning applies to this. Each claim is based on the same fallacy. What was the loss at the moment of the breach of contract? Let us see what difference it at once caused in the plaintiff's position. Had the contract been fulfilled he would have had an estate subject to a mortgage of 5000*l*., and in debt to him 200*l*., in all 5200*l*., with other liabilities. By the breach of contract he had an estate subject to a mortgage of 4100*l*., and in debt to him 1100*l*., in all 5200*l*., and subject to the same further liability. His position therefore was the same, less the expence of the abortive mortgage. He became worse off by subsequent events which might or might not have happened. The case has been put of a horse to be delivered and paid for at a future day, and the property not to pass meanwhile, which sickens with a mortal disorder before the time for delivery and dies after the buyer refusing to take it. We think the buyer would be liable for the whole price, because there is a market price for such things, and the market price of the animal would have fallen. But that is not the case with land; nor, indeed, is that the claim made here. It is not said the land fell in price, and so the defendant ought to pay the

difference. It is said the land remained the same in value, but by the acts of others was sold at a loss. The case is more as though the rejected horse, in being ridden home, ran away or was run against and got hurt. The present case seems to me the same as though I were to say, "I will always give you twenty shillings for a sovereign," and the promisee sends me one by a child: I break my promise, the child returns with the sovereign, shews it to other children, and it is stolen or lost. Should I be liable? Certainly not. *Logan v. Hall* (a) seems very much in point.—See also Sedgwick on Damages, chap. III.; Mayne on Damages, p. 14, and the cases of *Archer v. Williams* (b) and *Tyrer v. King* (c), cited by him: see also *Laird v. Fm* (d).

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We think, therefore, the damages are the expenses of the abortive mortgage. If the premises were worth less than 5000*l.*, and there was no covenant in the mortgage to pay the money, then the difference between *their value* and 5000*l.* might be recovered. Anyhow the direction to the arbitrator cannot be to ascertain the loss as proposed by the plaintiff, without taking into account whether or no the plaintiff could have prevented that loss by finding another mortgagee or otherwise.

Rule absolute to reduce the damages to the amount of the costs of the abortive mortgage, such amount to be assessed by an arbitrator.

(a) 4 C. B. 598.  
 (b) 2 C. & K. 25.

(c) 2 C. & K. 149.  
 (d) 7 M. & W. 474

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WELLOCK v. CONSTANTINE (a).

In an action by a woman for assaulting her and forcibly violating her person, whereby she was delivered of a child, the Judge upon her evidence directed a nonsuit.—

*Held*, that the direction was right, for if a rape had been committed no action would lie until after the defendant had been prosecuted, and if the plaintiff had consented she could not maintain an action for the assault.—Per *Pollock*, C. B., and *Bramwell*, B.: *Dubitante Martin*, B.

**DECLARATION.**—For that the defendant assaulted and beat the plaintiff, and forcibly violated her person and debauched and carnally knew her; whereby the plaintiff became pregnant and ill and has been delivered of a child, and has been prevented from earning her livelihood, and has become liable to maintain the child.

**Plea.**—Not guilty.

At the trial, before *Willes*, J., at the Yorkshire Spring Assizes, 1862, the plaintiff, who was a young woman in the service of the defendant, stated that whilst his wife was from home, he came one night into her bed-room when she was in bed: that she jumped on to her knees: he seized her round the knees, threw her down, and had connexion with her. She subsequently gave birth to a child.

It was objected, on behalf of the defendant, that the action was not maintainable, inasmuch as there was proof of a rape. It was submitted, on the part of the plaintiff, that she was entitled to recover for an assault; and that the jury might draw a distinction between that part of the evidence which related to an assault and that which related to a rape.

The learned Judge ruled that the action was not maintainable; for if a rape was proved, that could not form the subject of a civil action, but the plaintiff must proceed criminally; if the connexion took place with the consent of the plaintiff, no action would lie, but she must apply for an order of affiliation.

(a) Decided in last Hilary Term but unavoidably postponed.

The learned Judge having intimated that he should direct a verdict for the defendant, the plaintiff's counsel elected to be nonsuited.

*Overend*, in the following Term, obtained a rule nisi for a new trial, on the ground that there was evidence to be left to the jury of a cause of action, against which

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*Price* shewed cause, in Trinity Term, 1862 (May 28).—The action is not maintainable, for the declaration alleges, and the evidence proved, a felonious assault. [*Martin*, B.—The defendant should have demurred to the declaration.] Issue having been taken upon it, the learned Judge was right in nonsuiting the plaintiff. If this action is maintainable, every woman upon whom a rape is committed may, instead of prosecuting for the felony, bring a civil action for damages. To allow such an action, would be in effect to permit the compounding of a felony. In *Stone v. Marsh* (a), where it was held that an action would lie for money obtained by means of forgery, the person who committed the forgery, had been tried, convicted and executed. There *Bosanquet*, Serjt., in his argument, said, “It is an incorrect expression to say that a debt or trespass is merged in a felony. The felon cannot be sued for the debt or trespass for a time, but the right of action is not gone for ever. The rule that a party injured by a felonious act cannot sue the felon, is founded on principles of public policy. The object of it is, to secure the punishment of offenders. But if the offender is dead, or has been brought to trial, the case does not fall within the reasons on which the rule is founded; and then the maxim applies, cessante ratione cessat et ipsa lex. The civil remedy against the felon is only suspended until the party has been tried for the felony. When that has taken place, and he has been either acquitted or con-

(a) 6 B. & C. 551.



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victed, an action for the civil injury resulting from his wrongful act is maintainable." The Court adopted that argument, and Lord *Tenterden*, in delivering their judgment, said: "There is, indeed, another rule of the law of England, viz., that a man shall not be allowed to make a felony the foundation of a civil action: not that he shall not maintain a civil action to recover from a third and innocent person that which has been feloniously taken from him; for this he may do if there has not been a sale in market overt; but that he shall not sue the felon; and it may be admitted that he shall not sue others together with the felon, in a proceeding to which the felon is a necessary party, and wherein his claim appears, by his own shewing, to be founded on the felony of the defendant: *Gibson v. Minet* (a). This is the whole extent of the rule. The rule is founded on a principle of public policy, and where the public policy ceases to operate, the rule shall cease also. . . Now public policy requires that offenders against the law shall be brought to justice, and for that reason a man is not permitted to abstain from prosecuting an offender by receiving back stolen property, or any equivalent or composition for a felony, without suit, and of course cannot be allowed to maintain a suit for such a purpose." In *Crosby v. Leng* (b) it was held that, after an acquittal of the defendant upon an indictment for a felonious assault upon the plaintiff by stabbing him, the plaintiff might maintain trespass to recover damages for the civil injury, if it be not shewn that he colluded in procuring such acquittal. [*Bramwell*, B.—I do not well see how a judge at nisi prius can refuse to try a cause; he is commissioned to try the issue raised on the record sent down to him. Is he to say that if the defendant has not been tried for the felony, there is no evidence in support of the plaintiff's case. *Pollock*, C. B.—There have been

(a) 1 H. Black. 612.

(b) 12 East, 409.

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cases which Judges have rightly refused to try (a).] In the case of highway robbery, could the person robbed, instead of prosecuting the offender, bring an action of trespass for the assault and with force and violence taking away the money? Or suppose a horse was stolen, could the owner maintain an action of trover against the thief? [*Martin, B.*—I have heard Lord *Wensleydale* say, that it was wrong for a Judge to refuse to try a cause. *Pollock, C. B.*—I think that no person has a right to call upon a Judge to try an issue in which the parties have no interest, as, for instance, whether a woman is chaste. Perhaps the better course would be, instead of nonsuiting, to discharge the jury or strike the case out of the list; but it seems to me the duty of the Judge not to proceed with cases of that kind, whilst others are waiting for trial, which may be of the utmost importance to the public.] The moment it appears that a felony has been committed, the civil action is suspended. According to the plaintiff's contention, the jury must be asked to disbelieve the testimony as to a rape and to believe the testimony as to an assault, which is part of the same transaction, and give exemplary damages for an aggravated assault. [*Martin, B.*—Suppose the plaintiff said there was no rape, but only an indecent assault, could the defendant, without plea, prove a rape and then call upon the Judge to nonsuit?] If not, the policy of the law would be defeated, which requires that a person injured by a felonious act should have recourse to a

(a) Lord *Loughborough* refused to try an action for a wager respecting the number of chances in throwing seven and eleven on two dice: *Brown v. Leeson*, 2 H. Black. 43. Lord *Ellenborough* refused to try an action for a wager, whether a person could be held to bail on a special original for a debt under 40*l.*: *Henkiah v. Guerss*, 2 Camp. 408; 12 East, 247. *Gibbs, C. J.*, refused

to try an action on a wager, whether an unmarried woman had a child: *Ditchburn v. Goldsmith*, 4 Camp. 152. *Abbott, C. J.*, refused to try an action for the stakes on a dog fight: *Egerton v. Furzeman*, 1 C. & P. 613. See also *Burn v. Taylor*, R. & M. 28; *Kennedy v. Gad*, 3 C. & P. 376; *Da Costa v. Jones*, Cowp. 729; *Robinson v. Mearns*, 6 D. & R. 26; *Thornton v. Thackray*, 2 Y. & J. 156.

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criminal tribunal before he seeks for redress by a civil action. The doctrine has been long established. In Vin. Abridg., "Trespass" (Y. 3.), pl. 2, it is said: "No trespass lies, because it appears to the Court to be felony, for this appertains to the king only to punish." Again, pl. 3: "An action of trespass does not lie for the baron for battery of the feme, by which the feme languished for six weeks and then died of the stroke, for this is felony, *Higgins v. Butcher(a)*," Com. Dig. Action upon the Case (B.5.) [*Bramwell*, B.—My difficulty is this.—Suppose the plaintiff swore to a rape, and the defendant said, "I insist upon the case being tried, as I can prove that the imputation is false:" would the Judge be at liberty to nonsuit? If so, a woman who wishes to calumniate a man, may bring an unfounded charge of rape against him, and the Judge, upon hearing her statement, may refuse to proceed with the trial, and the man must submit to the imputation of a scandalous charge.] In *Dawkes v. Coveleigh(b)*, where it was held that trespass for breaking the plaintiff's house and stealing his money would lie after conviction of the defendant for the felony, *Roll*, C. J. said: "If it were before conviction the action would not lie, for the danger the felon might not be tried. And there is no inconvenience if the action do lie, and since he could not have had his remedy before, he shall not now lose it, and now there is no danger of compounding for the wrong." [*Martin*, B.—Before the 24 & 25 Vict. c. 96, s. 41, if a person was indicted for assaulting and robbing another, and the jury acquitted him of the robbery, he could not be convicted of the assault.] In *Regina v. Clarke(c)*, *Alderson*, B., held that on a charge of rape, if the jury disbelieved the prosecutrix as to the rape, they could not find the prisoner guilty of an assault where they had no other evidence

(a) *Yelverton*, 89, 90.

(b) *Styles*, 346.

(c) 3 Cox Crim. Cas. 481.

than the statement of the prosecutrix. He also referred to *la re Thompson* (a), and Noy's Maxims, p. 205, note (a).

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*Occerend* and *T. Jones*, in support of the rule.—The plaintiff merely proceeded for an aggravated assault, and, although the object of the cross-examination was to shew a rape, there was no proof that a rape had been committed. The rule of law laid down in the old authorities, and adopted in *Stone v. Marsh* (b) and *Crosby v. Leng* (c), is not disputed, and if a rape had been proved, the civil remedy would have been suspended. But the learned Judge was not justified in withdrawing the case from the jury. Trials of actions for wagers were frequent until the 8 & 9 Vict. c. 109, passed. [*Pollock*, C. B.—That statute was not passed with reference to the discretion of a Judge to try an indecent wager.] As in the case of *Regina v. Clarke* (d), the transaction may consist of two distinct parts. [*Martin*, B.—The real question is this.—Suppose that every allegation in the declaration had been proved, and, in addition, the Judge was of opinion that upon the evidence a rape had been committed, could he take upon himself to direct a verdict for the defendant?] In that case, the right of action would be altogether gone, even though the defendant was afterwards indicted for the rape and acquitted. The defendant might have pleaded, in suspension of the action, that no criminal prosecution had been instituted: *Stephen on Pleading*, p. 43; and after conviction or acquittal of the defendant the plaintiff might have maintained another action. [*Bramwell*, B.—Suppose an action for an assault, to which the defendant pleaded not guilty, and on cross-examination the plaintiff says that at the same time he lost his purse, and the defendant took it. On re-examination, being asked

(a) 6 H. &amp; N. 193.

(b) 6 B. &amp; C. 551.

(c) 12 East, 409.

(d) 3 Cox Crim. Cas. 481.

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judgment debtor) granted and assigned to David Bamberger (hereinafter called the claimant or trustee) certain property described in such deed upon the trusts therein expressed. The original deed is to be produced for the inspection of the Court. It is to be taken as having been bonâ fide executed by the assignor for the purpose therein expressed, and to be a good and valid deed, such as would change the property unless it is void for want of registration under the Bills of Sale Act, 17 & 18 Vict. c. 36. It was not registered under that Act, but required such registration unless it comes within the exception in that Act.

The deed was executed by three-fourths in value of the creditors of Venn. It was executed by the trustee, and was attested by an attorney, and was within twenty-eight days from the execution thereof (having been in all respects first duly stamped) duly registered as required by the Bankruptcy Act, 1861, together with such affidavits and particulars as by that Act are required. There was also indorsed on the deed the memorandum by that Act required. A copy of the entry of registration was duly published in the *London Gazette*, as by the Act required.

After the before mentioned requisites under the said Bankruptcy Act had been complied with, and after notice of the filing and registration, as aforesaid, had been given, the plaintiff (hereinafter called the judgment creditor) issued a writ of fieri facias against the goods of the judgment debtor, under which the sheriff of Middlesex seized certain of the goods comprised in the deed before mentioned. The goods so seized were claimed by the trustee Bamberger. The sheriff thereupon called upon him and the execution creditor to appear on an interpleader summons. On the hearing thereof, the parties agreed to leave it to me to decide all questions between them, subject, however, to my referring

any point of law, which I might think fit, to the Court. No application has been made to set aside the writ. After hearing the parties, I made an order that the money in the hands of the sheriff, the produce of the seizure, after deducting expenses, be paid over to the claimant, the trustee. All questions of fact are to be taken as having been disposed of by me; but if, upon motion made by the execution creditor on or before the 5th day of next Easter Term, and a rule obtained to set aside or vary my said order, the Court shall be of opinion, and decide that the deed of the 30th of October, 1862, required to be registered under the Bills of Sale Act, and further that the execution creditor could avail himself of the seizure under the writ of execution after the proceedings had been taken under the Bankruptcy Act, 1861, then my order is to be set aside, and the money in the hands of the sheriff paid over to the execution creditor, or my order varied as the Court may direct.

The deed, to which the memorandum referred, was dated the 30th of October, 1862, and was, so far as is material, as follows:—To all to whom these presents shall come. We whose names and seals are hereunto subscribed and set being severally and respectively creditors of Robert John Venn, of Baker Street, &c., pianoforte maker and music seller, greeting: Whereas the said Robert John Venn is justly and truly indebted unto us the said several creditors in the several and respective sums of money mentioned and set opposite to our respective names and seals in the schedule hereto. And whereas the said Robert John Venn is unable to pay and discharge our several and respective debts in full, and has offered to pay to us respectively a composition of 7s. 6d. in the pound upon our several and respective debts, claims, and demands upon and against the said Robert John Venn, payable in manner following, that is to say, the sum of 3s. in the pound in four months from the

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date of these presents, and the further sum of 3s. in the pound in eight months from the date of these presents, and the further sum of 1s. 6d. in the pound in ten months from the date hereof, upon having the security hereinafter mentioned for the due payment of a portion of the said 7s. 6d. composition upon our respective debts or claims as hereinafter mentioned, and which composition we the said creditors hereby severally and respectively and for our several and respective partners or partner their and his executors, &c., covenant, promise and agree to and with the said Robert John Venn, his heirs, &c., to accept in full satisfaction and discharge of our said several claims upon and against the said Robert John Venn, as set opposite to our several and respective names and seals in the schedule hereunder written: Now know ye that, in consideration of the payment to us severally and respectively of the said composition of 7s. 6d. in the pound upon our said several and respective debts, we do hereby for ourselves, severally and respectively, and for our several and respective partners and partner, their and his heirs, &c., undertake to remise, release, and for ever quit claim and discharge the said Robert John Venn, his heirs, &c., of and from the said several and respective debts and sums of money expressed and set opposite our several and respective names and seals in the schedule hereunder written after the due payment of the said several sums of the said composition hereinbefore mentioned on the days hereinbefore appointed for payment thereof; and of and from all costs, damages, &c., in respect of any of the debts of the said creditors, parties thereto. Covenant by the said creditors respectively to indemnify Venn against any securities given to themselves on account of their said debts. " And whereas David Bamberger hath agreed with the said Robert John Venn and his said several creditors to become security for the due payment of the two respective

sums of 3s. payable in four and eight months after the date hereof, and hereby undertakes to and guarantees the due payment of the said respective sums of 3s. in the pound and 3s. in the pound, on the respective days appointed for payment thereof to the said several creditors of the said Robert John Venn, and whose names and claims are mentioned in the schedule hereto. And we, the said several creditors, for ourselves, our heirs, &c., hereby agree to accept the said David Bamberger as security for the due payment of the said respective sums of 3s. and 3s. in the pound on the days hereinbefore appointed for the payment thereof, being a composition of 6s. in the pound upon our respective debts, and we, the said several creditors, in addition to the said several sums of 3s. and 3s. in the pound so secured as before mentioned, have agreed to accept the further sum of 1s. 6d. in the pound upon our respective debts or claims, upon the sole security of the said Robert John Venn, payable as hereinbefore mentioned. And lastly, the said Robert John Venn hereby covenants and agrees to and with the said David Bamberger that, in consideration of the said David Bamberger having become security as hereinbefore mentioned, he the said Robert John Venn has granted and assigned unto the said David Bamberger all and singular his stock in trade, fixtures, debts, and other securities for the payment of the said respective sums of 3s. and 3s. in the pound as hereinbefore mentioned in trust for the said creditors."

The schedule contained the signatures of thirty-three creditors, and the amount of their respective debts, and of the composition payable in respect thereof.

*J. Brown*, in the present Term, obtained a rule calling on the claimant David Bamberger to shew cause why the sheriff of Middlesex should not pay over the money levied under the execution to the execution creditor, instead of to the claimant, and the said order be varied accordingly.

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*Hannen* shewed cause.—The deed does not require registration under the Bills of Sale Act. The 7th section of that Act expressly excepts such instruments. That section, after specifying what documents the term “bill of sale” shall include, provides that it shall not include (inter alia) “assignments for the benefit of the creditors of the person making or giving the same.” The argument on the other side will, no doubt, be that this is not an assignment for the benefit of all the creditors, but is restricted in its operation to the particular creditors by whom it is executed. But that is not the true effect of the deed. It is substantially for the benefit of all the creditors. Its terms are general, and there is nothing upon its face by which any creditor is excluded. If a creditor, who applied to execute, were not permitted to do so, a Court of equity would grant relief. [*Channell*, B.—One argument relied on at Chambers was, that the admission of any other creditors would extend the liability of the person who guaranteed the composition.] That must depend upon the original intention of the deed. The deed is drawn in a form which was common before the Bankruptcy Act, where the object was to give every creditor an opportunity of coming in. As matter of fact, it cannot be doubted that this was here the intention. The clause at the end of the deed operates as an assignment of all the debtor’s “stock in trade, fixtures, debts, &c.,” for the benefit of all the creditors who will avail themselves of it. The release is conditional on the instalments being paid on the days specified. If default were made in payment of the instalments, the trust with which the property assigned would be affected, would, it is submitted, be for all the creditors. Since the decision of *Ilderton v. Castrique* (a), it is perhaps not open to argue that this deed is, by virtue of the Bankruptcy Act, 1861, binding on creditors who decline to execute it. That case is,

(a) This case was decided on the previous day (May 6). 14 C. B., N. S. 99.

however, at variance with *Ellis v. Ollave* (a) and the opinion of Lord Chief Justice *Holt*, in *Feltham v. Cudworth* (b), in both of which cases the same question arose upon the construction of a repealed statute (8 & 9 Wm. 3, c. 18,) which had a similar object. The conditions necessary to render a deed valid under the Bankruptcy Act have been here complied with, so that if the Court should be of opinion that the deed is one which would, under that statute, be binding on all the creditors, registration under the Bills of Sale Act would not be necessary.

*J. Brown*, in support of the rule.—“An assignment for the benefit of *the* creditors,” within the exception in the 7th section of the Bills of Sale Act, must be one for the benefit of *all* the creditors and not merely of a *part* of them. Otherwise, every assignment by a debtor to any of his creditors will escape registration, however small a proportion they may be of the general body of creditors. But that would be contrary to the express object of the Act, as appears from the language of the preamble. The preamble recites that “frauds are frequently committed upon creditors by secret bills of sale of personal chattels, whereby persons are enabled to keep up the appearance of being in good circumstances and possessed of property, and the grantees or holders of such bills of sale have the power of taking possession of the property of such person *to the exclusion of the rest of their creditors*.” On the other hand, where the deed is for the benefit of *all* the creditors, it is not within the mischief against which the Act is aimed. Again, the words “assignment for the benefit of the creditors” also occur in the 1st section, and there the context shews that they must mean “for the benefit of *all* the creditors.” Assuming, therefore, that this is the true interpretation of

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(a) 3 Salk. 60.

(b) 1 Comyn, 112; S. C. 2 Ld. Raym. 760.

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these words in the 7th section, the next question is, whether this deed is such an assignment? Now, on its face, it clearly does not purport to be so. It purports to be an assignment, not for the benefit of all the creditors, but of the creditors by whom it is executed. [*Channell, B.*—If the property assigned had been sold, and the proceeds had exceeded the sum guaranteed, would there be no trust as to the excess for the benefit of creditors who had received no composition?] After payment of the composition to the executing creditors, the trust would result for the benefit of the debtor. This form of deed may not have been an uncommon one before the modern Bankruptcy Acts, where the object was merely to bind the parties who signed the deed. [*Channell, B.*—Assume that the deed binds such parties only; still, might it not operate to transfer the property?] Not unless it be registered under the Bills of Sale Act. [*Pollock, C. B.*—There is nothing to prevent any creditor who desires it from participating in the benefits of the deed.] That, it is submitted, is at the debtor's option. The names of all the creditors should at least have been scheduled, if such were the intention of the deed. Then, with regard to the Bankruptcy Act, 1861, it is clear upon the authorities that a deed in this form is not binding on all the creditors under that statute: *Walter v. Adcock* (a); *Ex parte Rawlings* (b); *Ex parte Morgan* (c); *Ilderton v. Castrique* (d). But further, these cases have a direct bearing upon the construction of this deed, since the principle on which they proceed is that a deed, which in terms extends only to the creditors who execute, is not a deed for the benefit of all the creditors. The case of *Hodgson v. Wightman* (e) may seem to some extent at variance with the other authorities. But there it

(a) 7 H. & N. 541.


(d) 14 C. B., N. S., 99.

(b) 32 L. J., N. S., Bank. 27.

(e) 1 H. & C. 810.

(c) 32 L. J., N. S., Bank. 15.

appeared, on the face of the deed, that it was to be executed by three-fourths of the creditors at the least, and the Court of Exchequer thought that it was thus shewn to be the intention of the parties that the deed should take effect under the provisions of the 192nd section of the Bankruptcy Act. It is admitted that, if all the creditors had here executed the deed, that circumstance would have cured the present objection.

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POLLOCK, C. B.—I am of opinion that the order of my brother *Channell* was correct, and that this deed does not require registration under the Bills of Sale Act. The deed is substantially an assignment for the benefit of all the creditors. It is clearly for the benefit of all who are willing to accept the composition and execute the deed. It has been argued that its operation is restricted to a part only of the creditors. But, although the deed nowhere states that it is intended to include all, its terms are sufficiently general to admit every creditor, and there is no indication of an intention to exclude any one. I fully concur in an observation which was made by my brother *Martin* during the argument, that any creditor might insist on signing the deed and receiving the composition, and, if this were refused, a Court of equity would compel the trustee to permit him to avail himself of the benefits which the deed confers. The rule must therefore be discharged.

MARTIN, B.—I am of the same opinion. The 7th section of the 17 & 18 Vict. c. 36 enumerates certain documents which the term “bill of sale” is to include, and certain other documents which it is not, and “assignments for the benefit of the creditors of the person making or giving the same” are of the latter class. Now, I read this deed, endeavouring to ascertain what the parties to it meant to

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express, and without resorting to extrinsic evidence to explain that meaning, and I cannot doubt that they meant it to be an assignment for the benefit of all the creditors without any restriction. This is, I think, the fair inference from the language of the deed. It was for the obvious interest of the debtor, that as many as possible of the creditors should be parties to it. And, in order to arrive at a contrary conclusion, an intent to exclude certain creditors must be inferred, which cannot be collected from the terms of the deed.

BRAMWELL, B.—In this case I entertain serious doubts. The first question which arises is, whether the exception in the 7th section of the Bills of Sale Act is confined to an assignment which is for the benefit of *all* the creditors, or whether it also applies to one which is for the benefit of a large body of the creditors, of whom it might be said that they were *substantially* all the creditors. I incline to the opinion that, for the reasons which have been given by Mr. *Brown*, a bill of sale to be within the exception must be for the benefit of *all* the creditors. But if so, the authorities which he has cited appear to me decisive. The deed must be construed, not by importing into it matter which is extrinsic, but by seeing what its terms are. It commences thus:—"We, whose names and seals are hereunto subscribed and set, being severally and respectively creditors of Robert John Venn." Now, if the creditors, whose names are there subscribed, had entered into an agreement with the debtor and his surety, which was to be carried into effect by this deed, and a term in their agreement had been that no other creditor should share the benefits of the deed, would it have been necessary to use express words of negation in order to exclude any such creditor from participation? I think not. For a deed in the precise form in which this

deed is drawn would have carried out the intention of the parties. But then it is said, that there can be no doubt that any creditor might execute this deed. And this is very possibly so. But this, in my opinion, cannot be inferred from that which appears on the face of the deed, but only from the deed coupled with certain matter which is extrinsic. And the law does not allow this. I therefore feel great doubt, whether, to be exempt from registration, a deed must not be for the benefit of all the creditors, and whether this must not also appear upon the face of the deed. The amount in dispute is here small, but the question involved is one of importance. It might easily have appeared on the face of the deed that it was for the benefit of all the creditors, and then no difficulty would have occurred.

CHANNELL, B.—I reserved this question for the opinion of the Court on account of its general importance, though the sum in dispute is not large. After hearing the question argued, I see no reason for supposing that my decision at Chambers was wrong. I therefore concur in the opinions expressed by the Lord Chief Baron and my brother *Martin*. I do not say that, if any creditor was expressly excluded by the terms of the deed, that the deed would be within the exception in the 7th section of the Bills of Sale Act. It is not necessary to decide that, nor whether extrinsic evidence may be resorted to in order to ascertain the intention of the parties. I form my opinion upon the terms of the document alone, that it is a deed which operates for the benefit of all the creditors.

Rule discharged.

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Where on a contract of sale of a portion of a large quantity of goods in the warehouse of the vendor, the vendee has resold the goods to a third person, whose right to them the vendor has recognised, he cannot afterwards dispute the title of such third person although the specific goods have never been appropriated to him.

Therefore where the defendants sold 348 barrels of flour to C., who sold them to the plaintiffs, and gave them a delivery order, upon presenting which to the defendants they said it was all right, and transferred the flour in their books from the name of

C. to that of the plaintiffs.—*Held*, that the defendants were estopped from saying that no property in the flour passed to the plaintiffs, although no specific portion of a larger quantity had been appropriated to them.

**T**ROVER for 246 barrels of flour.

Pleas.—First: not guilty—Secondly, that the goods were not the plaintiffs' as alleged.

At the trial before *Pollock* C. B., at the London Sittings, after last Michaelmas Term, the following facts appeared.—The plaintiffs and defendants were corn factors in Mark Lane, London. One of the defendants, M. Coventry, was the owner and keeper of a corn and flour warehouse at Shad Thames. In August, 1862, one Clarke, a dealer in flour, and whose business consisted in buying it from factors and reselling it to bakers and other retailers at a small profit, applied to the plaintiffs for advances on a quantity of flour which he had purchased of the defendants, and he delivered to the plaintiffs the following order:—

“Jack's Coffee House, Mark Lane,

“August 25, 1862.

“Mr. M. Coventry, deliver to Messrs. Woodley and Meadows

“130 barrels flour, Columbia Mills.

“218 ditto Diamond ditto.

“Joseph Clarke.”

The plaintiffs, before consenting to make any advance on this order, sent it to the warehouse by a clerk, who made the inquiry there whether “it was all in order,” and receiving an answer “yes,” thereupon lodged the order at the warehouse, when it was accepted. The clerk also took

samples from the bulk, and reported what had passed to the plaintiffs, who thereupon advanced to Clarke 950*l*. on this and some other flour, for which Clarke had previously given them a delivery order. The plaintiffs subsequently sold small quantities of the flour, which were delivered by the warehouseman to the plaintiffs' purchasers in pursuance of ordinary delivery orders for that purpose. On the 9th of September, Clarke was declared bankrupt and absconded without having paid for the flour, and the defendants refused to deliver any more of it to the plaintiffs.

It appeared by the evidence on behalf of the defendants, that on the 23rd of August Clarke purchased of them at their stand in the corn market 350 barrels of flour, and received a sale note, and the defendants also gave Clarke the following delivery order:—

“ Corn Exchange, 23/8, 1862.

“ Mr. M. Coventry, 20, Shad Thames.

“ 130 Barrels of Flour, Columbia Mills, ex Oder.

“ 220 Do. Do. Diamond Mills, ex Aquila.

“ All charges after fourteen days to be paid by buyer. No refusal will be accepted, unless sufficient reason be given at our stand by 11 o'clock next market day.

“ For Coventry and Co.,

“ J. M. Hall.

“ N.B.—No corn to be delivered but to printed notes from our house.”

This order was lodged by Clarke the same day at the warehouse of the defendant, M. Coventry, in Shad Thames, and Clarke's name was entered in the defendants' book as the purchaser of that quantity of flour. Two barrels of flour were afterwards delivered by the defendants upon Clarke's order. When Clarke sold this flour to the plaintiffs, there were in the warehouse 361 barrels of flour, Columbia Mills, ex “Oder,” and 506 barrels of flour,

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Diamond Mills, ex "Aquila." The whole were in one warehouse, and there had been no separation or appropriation of any particular barrels to Clarke. The usual course of business was, upon the lodgment of a delivery order to make an entry of the names and quantities in a book kept for that purpose, and to give out samples from the bulk. It was not the practice to set apart or appropriate any specific barrels to any contract or delivery order; but the usual course was, when delivery orders were presented for actual delivery of any quantity, to deliver that quantity as it came from the bulk, and in the order in which deliveries were required. At the time when Clarke absconded and the defendants refused to deliver the flour to the plaintiffs, there was a much larger quantity of flour in the warehouse, both of Columbia Mills, ex "Oder," and Diamond Mills, ex "Aquila," than sufficient to answer the delivery orders lodged by the plaintiffs. The defendants endeavoured to establish a case of fraud and collusion between the defendants and Clarke, but failed.

It was objected on behalf of the defendants, that, as there had been no appropriation of any specific barrels of flour, no property passed from the defendants to Clarke, and therefore he could convey no property to the plaintiffs. The learned Judge overruled the objection, and a verdict was found for the plaintiffs, with 310*l.* damages.

*Shee*, Serjt., in the following term obtained a rule nisi for a new trial on the ground of misdirection in the Judge holding that the property had passed from the defendants to Clarke and from Clarke to the plaintiffs, although no specific barrels of flour had been set apart or otherwise appropriated to the contract between the defendants and Clarke; against which

*Lush* (*Karslake* and *W. D. Meadows* with him) now

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shewed cause.—This is not a question whether, as between vendor and vendee, the property in the flour passed, but a question between the vendor and a purchaser from the vendee, that purchaser having advanced money upon it. The rule that upon a contract of sale no property passes unless there has been a specific appropriation of the goods, does not apply. The defendants, as warehousemen, having assented to the delivery order, and transferred the flour from Clarke's name to that of the plaintiffs, are estopped from denying, as against the plaintiffs, that Clarke had a right to make such an order, or that they had the goods represented by it, and that the property in the goods passed to the plaintiffs. In *Steward v. Denton* : a warehouseman, on receiving an order from the seller of malt to hold it on account of the purchaser, gave a written acknowledgment that he so held it, and he was not allowed to set up as a defence for not delivering it to the purchaser, that by the usage of trade the property in malt sold was not transferred until it was remeasured, and that, before the malt in question was remeasured, the seller became bankrupt. There Lord *Ellenborough* said:—"Whatever the rule may be between buyer and seller, it is clear the defendants cannot say to the plaintiff 'the malt is not yours,' after acknowledging to hold it on his account. By so doing they attorned to him, and I should entirely overset the security of mercantile dealings, were I now to suffer them to contest his title." That case was recognised in *Hawes v. Watson* (b), where the vendor of some tallow lying at a wharf gave a written order upon the wharfingers to weigh, deliver, transfer and rehouse the same. The vendee resold the tallow, and delivered to the purchaser a written acknowledgment from the wharfingers that they had transferred the tallow to his account, and debited him with the charges from a certain period; and it was held that,

(a) 2 Camp. 344.

(b) 2 B. & C. 540.

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although the tallow was not weighed, the wharfinger could not, after his acknowledgment, deny that he held it as the agent of the purchaser. That doctrine was confirmed in *Gosling v. Birnie* (a).

The Court then called upon

*Watkin Williams*, to support the rule.—This action is founded in property in the goods and not in contract. It is conceded by the plaintiffs that this being merely an executory contract for the sale of a certain quantity of flour, and no specific flour having been appropriated to it, no property *in fact* passed, and that the property still remained in the defendants; the question, therefore, is now narrowed to this, whether, under the circumstances, the defendants are estopped from setting up the true state of facts, shewing that the flour which was the subject of these transactions was not any specific flour, none ever having been separated or appropriated from a larger bulk to this contract. As between the defendants and Clarke, unquestionably the rights of the parties were still merely in contract, as no right of property in any particular flour had vested in him, and the sole question is, whether the defendants have so conducted themselves in their dealings with the plaintiffs, or have said or done anything to estop them from relying upon the real facts, so far as they afford a defence to this action. No doubt the defendants are estopped from setting up any facts inconsistent with what they led the plaintiffs to believe the facts really were. That is the true nature of estoppel; but beyond that the defendants are not estopped. The class of cases referred to, of which there are a large number, do not apply to the present case at all. The conditions precedent to the passing of the property in

(a) 7 Bing. 339.

goods from a vendor to a purchaser are divisible into two distinct classes. First, there is the necessary condition, that the *goods* in which the property is to pass shall be specific and individual. Secondly, there is the class of cases where the goods are specific, but by the terms of the dealing something has to be done, or is to happen, before the property vests in the purchaser. Now, in the latter class of cases, a warehouseman, who accepts and acknowledges a delivery order coming from the original vendor, is estopped from disputing the nonperformance of any of the conditions upon which a delivery of the specific goods is to take place, as it would be inconsistent with his acceptance of an order for delivery; so also, no doubt, he would be estopped, as indeed in all cases, from disputing that he had any goods applicable to the delivery order. All the cases referred to belong to this class; but the present case belongs to the former class, and there is no authority to be found which decides, that the mere acknowledgment of a delivery order does away with the necessity for the performance of that condition precedent to the passing of the property which consists in the goods being specific and identified, which depends not on the mere agreement of the parties, but upon the reason and necessity of the thing. The defendants have not said or done anything inconsistent with the facts they set up and rely upon. They never represented that the goods were specifically appropriated, or that any particular goods belonged to Clarke. They were asked whether the delivery order was *in order*, and they said "yes," and they do not now seek to dispute that fact. If there had not been sufficient goods to satisfy the order they would, no doubt, have been estopped from setting that up, as it would not be consistent with what they had previously stated; but it is not inconsistent with the delivery order being right, that the goods should be part of an entire bulk,

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and not specifically appropriated to the contract or the order. The legal consequence of this latter circumstance is another matter; and it no doubt happens that it has the effect of shewing that the plaintiffs have no rights or remedies founded upon property in the goods, and have only the contract to resort to; and the question, therefore, in one form comes to this, whether the plaintiffs have any rights founded in property, or whether their rights are merely in contract. [*Bramwell, B.*—What remedy do you say the plaintiffs could have adopted?] The plaintiffs had a right to avail themselves of the contract between the defendants and Clarke, the benefit of which had been transferred to them, and they might have sued in Clarke's name, and to such an action the defendants had a good defence. As to the merits of the case, the sole question is, who is to suffer for Clarke's fraud? If the plaintiffs can enforce a right of property in the goods the defendants must suffer, but if the transaction still remains in contract the plaintiffs will lose their money. Hardship ought really to be out of the question, and the matter is one of pure law. Now, the estoppel can only be as to facts, and what have the defendants done or said to estop them from shewing that the goods to which this delivery order related, form an undivided part of a larger bulk? They do not want to dispute that there were goods applicable to this contract and delivery order, they only say that the goods are not specific, but an undivided part of a larger bulk. Suppose, in the present instance, the fact of no property in the goods having passed to the plaintiffs had been attended with no substantial consequences to them, and that whilst they were deprived merely of this form of remedy by action of trover, the remedy on the contract had been equally available and had not been impaired by the conduct of their vendor, Clarke; could it have been contended for a moment that the defendants were estopped

from shewing the facts now sought to be set up? The particular bearing or effect of a fact upon the legal rights of parties is not the true test whether a party by his conduct is estopped from setting up the truth as to that fact. Further, if there is an estoppel, it must be mutual, and suppose there had been a fire at the warehouse, and half the flour had been burned, could the defendants have cast the loss, or any part of it, on the plaintiffs? [*Pollock*, C. B.—It was the defendants' duty to have appropriated 348 barrels of flour to the order when they accepted it, and it is their own fault if they are in such a difficulty.] The defendants were guilty of no default or neglect; and everything was done in the usual and ordinary course, and that makes the point as to the estoppel the more clear. The usual course was not to appropriate from the bulk until actual delivery, so that when the delivery order was lodged, and the plaintiffs were told that it was right, there was nothing at all, according to the usual course of business, to justify the plaintiffs in coming to the conclusion that it meant that any particular flour had been transferred to Clarke, or to themselves. Here, the defendants seek to set up facts in no way inconsistent with anything they have said or done, or induced the plaintiffs to believe in. It is no ground for the estoppel that the facts relied on by the defendants would have the legal effect of preventing the plaintiffs from resorting to one description of rights and remedies.

MARTIN, B.—I am of opinion that the rule ought to be discharged. The question depends on the real nature of the transaction as between the plaintiffs and the defendants. I think, upon the authority of *Hawes v. Watson* (a), that the question is not whether Clarke was the owner of the flour, but whether, as between the plaintiffs and the defend-

(a) 2 B. & C. 540.

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ants, the latter must not be taken to have assented that there were 348 barrels of flour at their warehouse deliverable to the plaintiffs' order; and if so, the property attached in the sense that the defendants are precluded in a Court of law from denying that they held that number of barrels on the plaintiffs' account. In strictness, the question whether the defendants assented is one of fact for the jury, but I am satisfied the jury would have found that such was the real nature of the transaction.


BRAMWELL, B.—I am also of opinion that the rule ought to be discharged. I think the case is precluded by authority, and I also think that convenience and good sense lean in the same direction. I doubt whether any question could have been properly left to the jury. It seems to me that my Lord would have had to say to them, "If you find that Clarke, having some flour to dispose of, assumed to deal with 384 barrels, and the defendants recognised his act, and admitted that they held that quantity of flour for him, the plaintiffs are entitled to recover." That, however, would not have been leaving to them any question, but only what was the fact. Mr. *Williams* says that the effect of the transaction is not that which I have suggested, but merely to give Clarke a right to demand the delivery of a certain number of barrels of flour, and which right he transferred to the plaintiffs. But that is not so. When the delivery order was presented to the defendants, they might have said, "We will not accept this order, for there are not 348 barrels of flour in our warehouse of which Clarke has a right to dispose. There is a much larger quantity in the warehouse out of which Clarke has a right to 348 when selected and appropriated to him, but, until that is done, he has no right to any, for they are not his." But, instead of saying that, the defendants in effect say, "We recognise a right in Clarke

to dispose of 348 barrels," which could only be upon the supposition that the property in 348 barrels had passed to him. That being the effect of the transaction, there was no question to leave to the jury. Mr. *Williams* has also suggested that we ought not only to look at the result of the evidence, but also consider what would have been the position of the parties if the flour had been burnt. Perhaps, in that case, the defendants would have had to bear the loss, because there was no appropriation of the flour; but it is unnecessary to consider whether or no they would have been entitled to be paid for it. It frequently happens that a person by making an acknowledgment precludes himself from setting up something favourable to him; and the only observation that arises is, that people should be more cautious. Then Mr. *Williams* says that the defendants are not to blame. I do not say they are, because persons are not to blame for not making provision against what may be called an abnormal condition of things, that is to say, insolvency or fraud. Therefore no one can blame the defendants because they did not reject the order. While, however, in one sense they were not in fault, in another sense they were, for by recognising the order they placed themselves in the difficulty which has been suggested of having no remedy against the plaintiffs if the goods were burnt, and nevertheless being liable in this action. Seeing therefore that the case is concluded by authority, and that no question could have been left to the jury unless it were one which they must inevitably have found in favour of the plaintiffs, viz., whether the effect of the transaction was that the defendant recognised the right of Clarke to dispose of 348 barrels of flour, I think the rule ought to be discharged.

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POLLOCK, C. B.—I entirely agree with the rest of the Court that the rule ought to be discharged. At the trial,



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it was never suggested that any question ought to be left to the jury. In the course of the reply of the plaintiff's counsel, the jury took the matter into their own hands, and said that they were perfectly satisfied, upon the facts proved, that the plaintiffs were entitled to recover. The real question was whether the defendants had so conducted themselves that the plaintiffs had a right to say, "We call upon you to deliver to us the flour which you say you held on our behalf." The question whether the property passed, as between vendor and vendee, never arose: the only question was whether the defendants had acknowledged that they held the flour on behalf of the plaintiffs, for, if so, according to law and justice, they were bound to deliver it or pay the damages.

Rule discharged (a).

(a) As to property passing by estoppel, see also Blackburn on Contract of Sale, p. 161; *Gillett v. Hill* (A.D. 1834), 2 C. & M. 530. There the defendant sold twenty sacks of flour, and the purchaser gave to the plaintiff a deliver order on the defendant "deliver 20 sacks households," and this was lodged with and accepted by the defendant, who subsequently delivered five of the sacks under an order to deliver "5 ex 20." In trover for the fifteen: held that defendant was

estopped from shewing that he had not so many as twenty sacks. *Jackson v. Anderson* (A.D. 1811), 4 Taunt. 24. As to specific identity being a condition precedent to property passing: *Cunliffe v. Harrison*, 6 Exch. 903; *Boswell v. Kilburn*, Privy Council (March 5, 1862); *Aldridge v. Johnson*, 7 E. & B. 885. 897; *Waite v. Baker*, 2 Exch. 1. As to the effect of a delivery order: *Kingsford v. Merry*, 1 H. & N. 503.

See also *Turley v. Bates*, *post*, p. 200.



## EASTER VACATION, 26 VICT.

## IN THE EXCHEQUER CHAMBER.

*(Error from the Court of Exchequer.)*

SWAN v. THE NORTH BRITISH AUSTRALASIAN COMPANY  
(LIMITED).

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May 15.

THIS was a proceeding in error upon the judgment of the Court of Exchequer for the plaintiff, on a special case stated for the opinion of that Court. The pleadings and facts fully appear in the report of the case in the Court below (7 H. & N. 603).

*Hawkins* (with whom was *Holl*) argued for the defendants (a).

*Lush* (with whom was *Hurlstone*) argued for the plaintiff.—  
The arguments were, in substance, the same as in the Court

The plaintiff, the registered owner of 1000 shares in a Joint Stock Company, in which the shares could only be transferred by deed executed by both transferor and transferee, employed a broker to sell for him some shares in another Company, which

were also transferable by deed only. The broker represented to the plaintiff that it was necessary for him to execute ten blank forms of transfer. The plaintiff accordingly signed, sealed and delivered to the broker ten forms of transfer in blank to be filled up by him for the transfer of the shares in the other Company. The broker only used eight of the blank forms for that purpose, and having stolen the certificates from a box deposited at a bank for safe custody, he feloniously filled up the two remaining forms as transfers respectively of 500 of the plaintiff's 1000 shares in the first mentioned Company, and, having forged the attestations, he delivered the transfers, together with the certificates, to bona fide purchasers for value, and on their being presented to the Company they removed the plaintiff's name from the register of shareholders and placed thereon the names of the purchasers.

*Held*, in the Exchequer Chamber, that the transfers were void, and that there was no such negligence on the part of the plaintiff as estopped him from insisting that the property in the shares did not pass under the transfers.—Per *Cockburn*, C. J., *Crompton*, J., *Willes*, J., *Byles*, J., *Blackburn*, J., and *Mellor*, J.—Dissentiente *Keating*, J.

Negligence, to operate as an estoppel, must be the proximate cause of the loss.

*Semhle*, that the doctrine of estoppel by executing instruments in blank is confined to negotiable instruments, and does not apply to deeds.

(a) May 14. Before *Cockburn*, C. J., *Crompton*, J., *Willes*, J., *Byles*, J., *Blackburn*, J., *Keating*, J., and *Mellor*, J.

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below, and the same authorities were cited, with the addition of *Cave v. Mills* (a).

*Cur. adv. vult.*

The learned Judges having differed in opinion, now delivered the following judgments.

MELIOR, J.—I have read and considered the very elaborate judgments already given on the two occasions in which the facts of the present case were considered by the Courts of Common Pleas and Exchequer, wherein all the authorities were discussed and the subject exhausted.

“As a general rule, no one can found a title upon a forgery” (b), but in certain cases, as said by my brother *Wilde* in the Court below (c), “the law merchant validates, in the interest of commerce, a transaction which the common law would declare void for want of title or authority; and transactions within its operation are as absolutely valid and effectual as if made with title or authority.” There are also cases in which, “where a man has wilfully made a false assertion calculated to lead others to act upon it, and they have done so to their prejudice, he is forbidden as against them to deny that assertion” (d). Whilst I and my brother *Wilde* entirely assent to that proposition, I hesitate as to the next: “that if a man has led others into a belief of a certain state of facts by conduct of culpable neglect calculated to have that result, and they have acted on that belief to their prejudice, he shall not be heard afterwards, as against such persons, to shew that that state of facts did not exist” (d). Assuming for the purposes of this case both these propositions to be true, I agree that they extend to transactions in which a deed is required to transfer an interest or a

(a) 7 H. & N. 913.

(c) 7 H. & N. 603.

(b) Per *Erle*, J., in *Ex parte Swan*, 7 C. B., N. S. 448.

(d) Per *Wilde*, B., 7 H. & N. 633.

right; not by validating a void deed, as was supposed on the argument, but by holding that parties shall not be permitted to aver, against equity and good faith, the invalidity of a deed which either by words or conduct they have asserted to be valid; and upon which the others have acted:

*Sheffield and Manchester Railway Company v. Woodcock (a).*

I proceed, therefore, to inquire what is the false assertion of the plaintiff in the present case, which has led the defendants to their prejudice to act upon it, or what the culpable negligence which has been *the proximate cause* that the defendants have registered a forged transfer as a genuine one, so as to estop the plaintiff from denying that his shares in the defendants' Company have been transferred to Mr. Barry.

*Intending to sell and transfer* certain shares which he possessed *in another Company*, he was induced by the representation of his broker to execute a blank transfer, for the purpose of enabling the broker to fill in the numbers and descriptions of *the shares in that Company*, and the *name of the vendee of those shares*, in order that those shares might be transferred to such vendee; whereas, the broker fraudulently filled in the numbers and descriptions of the shares in question, which the plaintiff *did not intend to sell or transfer*, and by a felonious theft of the certificates of such last mentioned shares, complied with the requisition of the Company, and induced them to register such deed as a genuine transfer. The false representation is the representation of the broker, not of the plaintiff, and the proximate cause which induced the Company to alter their position to their prejudice, was the fraudulent and felonious conduct of the broker, and not the negligence of the plaintiff.

The doctrine established by the cases of *Pickard v. Secres (b)* and *Freeman v. Cooke (c)*, is a most useful one,

(a) 7 M. & W. 574.

(b) 6 A. & E. 469.

(c) 2 Exch. 654.

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and I should be sorry to see it narrowed or frittered away, but it appears to me to be inapplicable to the circumstances of the present case. To make the present case like those, there must have been a false representation or culpable negligence affecting the transfer of shares in the defendants' Company, and not affecting an entirely different transaction.

I therefore think that the judgment of the Court of Exchequer must be affirmed.

KEATING, J.—I am of opinion that the judgment should be reversed upon the ground that the plaintiff has by his culpably negligent act enabled his agent to commit a fraud to the prejudice of third persons, by fabricating a transfer to them of the shares in question, and has so estopped himself from asserting as against such third persons that the transfer did not operate. That a party may so estop himself, even in the case of a deed, although denied in the Courts below, has not been argued in this Court, and I shall therefore content myself by referring to the judgment of the Chief Justice in *Ex parte Swan* (a), and of my brother *Wilde* in the present case, in the Court of Exchequer, in support of that position, merely adding that I am not aware of any decision which counteracts it. The stress of the argument here has rather been that, however true that principle may be even as applicable to a deed, the facts do not bring the present case within it. It is said there has been no representation whatever as to the Australasian shares, but only as to Australian shares, and as between the plaintiff and Oliver, no doubt the directions to sell concerned only the latter; but as to third persons, if there has been any representation as resulting from acts of culpable negligence, it applies as much to the one as to the other. Here the plaintiff delivered to his agent blank transfers, signed and sealed, to be filled up by him with the

(a) 7 C. B., N. S. 429.

names of the shares, transferees, and even with the names of attesting witnesses, with the intent that he should thereby obtain money from third persons for shares which he must be taken to have known his agent could not thus legally transfer, but could only make a fraudulent semblance of doing so; and when the agent has, by means of such transfers, obtained money from innocent third parties, the question is whether he can be heard to say as against such third parties that his agent filled up the names of the shares as Australasian, whereas he had directed him to fill them up as Australian shares. I think not, upon any principle that would not equally apply to a blank acceptance fraudulently filled up, but in the hands of a bonâ fide holder. It was argued in the Court below, that forgery and robbery were not the necessary or ordinary result of the act of delivering the blank transfers, but neither is it in the case of blank acceptances fraudulently filled up, nor was it in the case of *Young v. Grote*. I am aware it has been said that the principles which are in such cases applicable to negotiable instruments, do not apply in other cases, but I have been unable to find any case decided upon any such distinction. Had such existed, it would have furnished a short answer in the case of *The Bank of Ireland v. Evans's Trustees*, in the 5th House of Lord's Cases; but it does not seem to have been given to that case, nor to have been adverted to, when the case of *Young v. Grote*, was cited in argument and commented upon in the judgments. It is true the plaintiff could not have anticipated the stealing of the certificates, but the title to the shares is conveyed by the deed of transfer, the certificates being merely, I apprehend, a machinery, established for the convenience of the Company in conducting their business, and I do not think the responsibility of the plaintiff in respect of the transfer made by his agent is affected or done away with because

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the transfer was completed by the felony of Oliver. No doubt the plaintiff, as far as appears, supposed Oliver to be an honest man, and was mistaken—a circumstance which must always occur in every case where a question like the present is or can be raised,—but the acts which, in *Young v. Grote*, and in *Taylor v. The Great Indian Peninsular Railway* (a), were said to be acts of culpable negligence, appear to me less in degree than the acts of negligence attributed to the plaintiff in the present case, and which directly and proximately enabled Oliver to effect the transfers which he made complete by his felony in stealing the certificates. I think therefore that the rule in the well known case of *Lickbarrow v. Mason* (b), referred to in *Ex parte Swan* (c), applies.

Were I to go more at large into the reasons upon which I found that opinion, I should only repeat what has been better expressed by the judgments in the Courts below, to which I have before referred.

BLACKBURN, J.—I think the judgment should be affirmed. Neither *Erle*, C. J., nor my brother *Keating*, in their judgments in the Court of Common Pleas in *Ex parte Swan*, nor my brother *Wilde*, in his judgment in the principal case, proceed on the supposition that the plaintiff had given any authority, real or apparent, to Oliver to sell the shares now in question, and indeed it is obvious that it cannot be for a moment contended that the fact that Oliver had been employed by the plaintiff as a broker in former transactions, clothed him with any general authority as plaintiff's agent to dispose of any other property of the plaintiffs.

Neither do they contend that the supposed deed of transfer on which the defendants acted really was the deed of the plaintiff; but they proceed on the supposition that the

(a) 4 De Gex & Jones, 559.

(b) 2 T. R. 70.

(c) 7 C. B., N. S. 400.

plaintiff had precluded himself as against the defendant from denying that it was his deed. Now I agree that a party may be precluded from denying against another the existence of a particular state of things, but then I think it must be by conduct on the part of that party such as to come within the limits so carefully laid down by *Parke, B.*, in delivering the judgment of the Court of Exchequer in *Freeman v. Cooke*. It is pointed out by *Parke, B.*, in the course of the argument in that case, that in the majority of cases in which an estoppel exists, "the party must have induced the other so to alter his position that the former would be responsible to him in an action for it;" and he had before pointed out that "negligence," to have the effect of estopping the party, must be "neglect of some duty cast upon the person who is guilty of it." And this, I apprehend, is a true and sound principle. A person who does not lock up his goods, which are consequently stolen, may be said to be negligent as regards himself, but inasmuch as he neglects no duty which the law casts upon him, he is not in consequence estopped from denying the title of those who may have, however innocently, purchased those goods from the thief, unless it be in market overt.

And in the considered judgment of the Court, *Parke, B.*, lays down very carefully what are the limits. He says, that to make an estoppel it is essential "if not that the party represents that to be true which he knows to be untrue, at least, that he *means* his representation to be acted upon, and that it is acted upon accordingly; and if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth; and conduct, by negligence or omission, where there is a duty cast upon a person, by usage of trade or otherwise, to dis-

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close the truth, may often have the same effect. As, for instance, a retiring partner omitting to inform his customers of the *fact*, in the usual mode, that the continuing partners were no longer authorized to act as his agents, is bound by all contracts made by them with third persons, on the faith of their being so authorized" (a).

What I consider the fallacy of my brother *Wilde's* judgment is this: he lays down the rule in general terms "that if one has led others into the belief of a certain state of facts by conduct of culpable neglect calculated to have that result, and they have acted on that belief to their prejudice, he shall not be heard afterwards, as against such persons to shew that state of facts did not exist." This is very nearly right, but in my opinion not quite, as he omits to qualify it by saying that the neglect must be in the transaction itself, and be the proximate cause of the leading the party into that mistake; and also, as I think, that it must be the neglect of some duty that is owing to the person led into that belief, or, what comes to the same thing, to the general public of whom the person is one, and not merely neglect of what would be prudent in respect to the party himself, or even of some duty owing to third persons, with whom those seeking to set up the estoppel are not privy; and these distinctions make in the present case all the difference. I think that all the cases cited by *Erle*, C. J., in his judgment in *Ex parte Swan* (b) may be easily shewn to be consistent with the limitations laid down in *Freeman v. Cooke*, except *Coles v. Bank of England* (which in a Court of error I may say I consider not to be binding), and *Young v. Grote*. I am relieved from making any comments on the latter case by the very lucid manner in which the authorities bearing on it are stated by *Williams*, J., in *Ex parte Swan* (b). It may be that case is to be supported on some of the grounds there stated, or upon the broader ground, apparently sup-

(a) 2 Exch. 663.

(b) 7 C. B., N. S. 429.

ported by the authority of *Pothier*, in the passage cited in *Young v. Grote*, that the person putting in circulation a bill of exchange does, by the law merchant, owe a duty to all parties to the bill to take reasonable precautions against the possibility of fraudulent alterations in it; it is not necessary in this case to inquire how that may be. It is sufficient to point out that a party signing in blank a cheque or bill, or other negotiable instrument, does intend that it shall be filled up and delivered to a series of holders, and therefore he stands to all those holders in the position indicated in the first branch of the judgment of *Freeman v. Cooke*. He means the holder to be induced to take the instrument as if it had been filled up from the first. And that makes a marked distinction between such a case and the present, in which Mr. Swan never did mean that any one should take this transfer of the shares as genuine.

And the facts in this case seem to me to be such as to make it fall precisely within the authority of *The Bank of Ireland v. Trustees of Evans's Charity* (a).

BYLES, J.—I am of opinion that the judgment of the Court of Exchequer should be affirmed.

The shares, by the constitution of the Company regulated by statute, could have been transferred by deed only. The alleged deed is confessedly void, because when it was executed by the plaintiff, the grantor, the subject-matter of the conveyance was not therein described, but left in blank, the blank being afterwards fraudulently filled up by the defendants' agent Oliver. It is plain upon all the authorities, that the deed as a deed is void. Void upon two grounds, first, that the subject of conveyance was inserted after execution; secondly, that it was fraudulently inserted, so that the deed is a forgery.

(a) 5 H. L. 389.

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But it is alleged that the plaintiff is estopped by his own negligence from relying on the facts and shewing the truth, to wit, that the alleged deed is for these reasons not his deed.

In support of the doctrine that a man may in a Court of law be estopped by mere negligence from shewing that a deed is not really his deed, no authority has been produced at the bar. Such a doctrine might lead to very dangerous consequences, as my brother *Williams* has shewn. A man prepares and executes in blank a deed for the conveyance of a cottage, his agent by the negligence of his principal is tempted and enabled to fill up the blank with the description of a large estate belonging to his principal. Can it be contended in a Court of law that the large estate has passed by the forged deed?

I am far from denying that in the case of his own fraud a man might be estopped from shewing that a deed is not his deed. Suppose, for example, the vendor of an estate to have received the purchase money and to have handed over a void deed to the purchaser, I conceive that he might be estopped from setting up the invalidity of the execution of the deed. To dispute his own signing and sealing of the deed would be to perpetrate a fraud. This question however could not often arise, for in most of such cases ratification would have cured defects; fraud, moreover, is an exception to all rules.


But the position that mere negligence of an alleged grantor may estop him from shewing that an instrument purporting to be his deed is not his deed seems to me both novel and dangerous.

The arguments drawn from negotiable instruments appear altogether inapplicable. The object of the law merchant, as to bills and notes made or become payable to bearer, is to secure their circulation as money; therefore honest acqui-

which confers title. To this respect the necessary principle the ordinary rules of the common law are made to bend. The misapplication of a genuine signature written upon a slip of stamped paper which transaction being a lottery would in ordinary cases convey no title may give a good title to any sum fraudulently inscribed within the limits of the stamp, and in America, where there are no stamp laws, to any sum whatsoever. Negligence in the maker of an instrument payable to bearer makes no difference in his liability to an honest holder for value: the instrument may be lost by the maker without his negligence or stolen from him, still he must pay. The negligence of the holder, on the other hand, makes no difference in his title. However gross the holder's negligence, if it is any sort of fraud he has a title. So that the argument from negotiable instruments if it were applicable might be returned for there, as here, a plaintiff who has been guilty of negligence may prevail against a defendant who has been defrauded without any negligence of his own at all. The truth is that in the case of a bill of exchange or promissory note, as well as in the case of a deed, the law respects the nature and uses of the instrument more than its own ordinary rules.

I have hitherto assumed that the plaintiff in the case before the Court has been guilty of negligence, but I do not think he has been guilty of negligence.

It appears by the regulations and practice of the Company that no transfer could be or ever was registered on production of the deed of transfer only, but that that deed must have been, and always has been in practice, accompanied by the certificate of the shares intended to be transferred. Now the plaintiff kept those certificates, without which the blank deed of transfer would have been inoperative to transfer the shares in question, locked up in a box of which he held the key, and as he supposed and had a right

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to suppose the only key. He had even at Oliver's suggestion put on a Chubb's lock for greater security, and had afterwards satisfied himself by personal inspection that the certificates were safe in the box, when the key of the locked box was in his own pocket. It is probable that the practice of Messrs. Chubbs to deliver duplicate keys, known to Oliver, but unknown to the plaintiff, was the motive for Oliver's suggestion; at all events it was the *causa sine qua non* of the fraud.

This case therefore is not the case of a principal entrusting his agent with blank transfers simply, but with blank transfers restrained by a bridle which the principal held in his own hand, as he had a right to suppose. The plaintiff therefore seems to me to have exercised reasonable care. He might undoubtedly have taken additional precautions, he might have used consummate, perfect care. But who does? If the law were so extreme to mark negligence what transactions could stand?

For these reasons I think the plaintiff not chargeable with negligence.

But, assuming that he was chargeable with negligence, still I think the plaintiff can recover, because the plaintiff's assumed negligence was not the proximate cause of the transfer by the defendants. Between the plaintiff entrusting Oliver with the blank transfers and the actual transfer by the defendant a series of causes intervened. First, the fraudulent secretion of the duplicate key by Oliver; next the trespass and larceny by Oliver in opening the box and stealing the securities; and, lastly, the treble forgery committed by Oliver in inserting the subject-matter of the transfer and the names of both the attesting witnesses.

Lastly, even had the plaintiff been guilty of negligence and had that negligence been the proximate cause of loss to the defendants, the legitimate consequence seems to me

to be that an action lies at the suit of the defendants against the plaintiff rather than that the rules of the common law touching the execution of deeds should be varied.

For these reasons I agree with the judgment of the Court below.

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WILLIAMS, J.—If I am at liberty to express an opinion, not having heard the whole of the argument, I concur with the judgment of the majority of the Court.

CROMPTON, J.—I am of opinion that the conduct of the plaintiff below was not such as to prevent him from setting up the truth, according to the rule laid down in *Freeman v. Cooke*, and that there was no such negligence on his part as to disentitle him from recovering according to the opinion of the Judges, as delivered by Baron Parke, in *The Bank of Ireland v. The Trustees of Evans's Charity*; and I therefore think that the judgment of the Court below should be affirmed.

COCKBURN, C. J.—I am of opinion that the judgment of the Court of Exchequer should be affirmed.

The plaintiff was a registered shareholder of the Company, the defendants in this action. According to the constitution of the Company, he could only be removed from the register of shareholders, and another person be registered in his place, on his shares being transferred by deed. His name has been removed from the register, and that of another person has been substituted, on a deed, which, though it purported to be his, and was in fact executed by him, yet having been executed in blank, and afterwards filled in contrary to his intention, is admitted to have been in point of law a forgery.

Now, it is plain that no title to property, whether real

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or personal, can be conferred by an instrument which, being forged, is in law void and inoperative. It is, however, contended that, though no title to these shares could pass by this deed, yet that, practically, the right of the plaintiff to have them treated as his is barred, because, as it is alleged, he is estopped by his own conduct from disputing the genuineness of the instrument. The estoppel thus contended for is based, first on the ground that the plaintiff has, by executing the transfers, led the Company, on the reasonable assumption of their genuineness, to register another party as shareholder, and thereby to place themselves in a false and prejudicial position with reference to the supposed transferee, so as to bring the case within the principle of the decisions in *Pickard v. Sears* and *Freeman v. Cooke*; and, secondly, on the ground that the plaintiff has by his negligence enabled a third party to convert a genuine instrument into a forged one, and thereby to practise a fraud on the Company so as to bring the case within the principle of the decision in *Young v. Grote*, and the cases decided on bills of exchange and other negotiable instruments. I am of opinion that neither of these positions is tenable, and that no estoppel arises in the present case to prevent the plaintiff from contesting the validity of this transfer.

To bring a case within the principle established by the decisions in *Pickard v. Sears* and *Freeman v. Cooke*, it is in my opinion essentially necessary that the representation or conduct complained of, whether active or passive in its character, should have been intended to bring about the result whereby loss has arisen to the other party, or his position has been altered. Here, nothing can have been further from the intention of the plaintiff, than that the deed signed by him should be used for the purpose of transferring these shares, or that the name of another person should be substituted for his on the register.

As regards the alleged estoppel by reason of the plaintiff's negligence, I am of opinion that negligence alone, a plaintiff may have committed no responsibility for the perpetration of a fraud by means of which another party has been induced, is not of itself a ground of estoppel. The rule relating to negotiable instruments stands on peculiar grounds. The law relating to these instruments is part of the law merchant, which is a body of law that has grown up in the course of centuries, and which is of the very essence of their commercial utility. It is a body of law which is not to be impaired. It is established that if a man signs a bill or note or other negotiable instrument, he shall be liable as if he had signed it without notice, in respect of what may be alleged to give effect or negotiability to the instrument. Notwithstanding this may be done in the absence of negligence, or even for the purposes of fraud.

The case of *Tarry v. Gator* on which so much reliance has been placed, and which is supposed to have established the doctrine of estoppel by reason of negligence when it comes to be more closely examined, turns out to have been decided without reference to estoppel at all. Neither the counsel in arguing that case nor the judges in deciding it, refer once to the doctrine of estoppel. The question arose on a disputed item in an account between a banker and his customer which had been referred to arbitration and the question raised by the arbitrator was in virtue of the law which had arisen from payment of a cheque in which by the carelessness of the customer an opportunity had been afforded for increasing the amount shown as paid.

It was held, not that the customer was deceived by denying that the cheque was a forgery, but that in the case which would otherwise fall in the category of a bad cheque, had been brought about by the act of the customer, the latter must sustain the loss. As the question arose on an account submitted in support of the

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matter was decided without reference to any technicality; but I am disposed to think, that, technically looked at, the matter would stand thus: the customer would be entitled to recover from the banker the amount paid on such a cheque, the banker having no voucher to justify the payment; the banker, on the other hand, would be entitled to recover against the customer for the loss sustained through the negligence of the latter.

Possibly, to prevent circuitry of action, the right of the banker to immunity in respect of the loss so brought about would afford him a defence in an action by the customer to recover the amount. So, in the present case, if through the negligence of the plaintiff, the Company should sustain a loss with reference to the party who has been substituted for him, the plaintiff might possibly be liable to the Company; and if his present demand were simply a money demand for the value of his shares, it may be that the loss sustained through his negligence might be an answer to the plaintiff's action. But the plaintiff here asks, not for a compensation of money alone, but also for a mandamus to restore him to his status as a registered shareholder of the Company; and it appears to me, therefore, that, if the Company have any claim on the plaintiff in respect of damage sustained through his negligence, they must be left to their cross action or such other remedy as may be available to them.

I must, however, say that, even if negligence could form a ground of estoppel to the denial of the genuineness of an instrument known to have been forged, negligence does not appear to me to be sufficiently established in this case. The mere execution of these deeds in blank would not have sufficed to enable Oliver, the plaintiff's agent, to commit the fraud on the Company.

By the rules and regulations of the Company, it was

necessary to the transfer that the certificates of the shares should be produced on the registration of the transfer. The certificates of these shares the plaintiff knew to be shut up in a box, of which, so far as he had reason to believe, he alone possessed a key.

It seems to me scarcely enough to constitute negligence, that he did not contemplate, and therefore render physically impossible, the felonious act of his agent in possessing himself of the certificates.

Even if what was done by the plaintiff could be held to amount to negligence, I am of opinion that the negligence would be too remote from the result on which the defendants rely, to constitute a defence. In *The Bank of Ireland v. The Trustees of Evans's Charities (a)*, *Parke, B.*, in delivering the opinion of the Judges in the House of Lords, says:—"If there was negligence in the custody of the seal, it was very remotely connected with the act of transfer. The transfer was not the necessary or ordinary or likely result of that negligence. It never would have been, but for the occurrence of a very extraordinary event, that persons should be found either so dishonest or so careless, as to testify on the face of the instrument that they had seen the seal duly affixed."

Now, here, the transfer deeds delivered in blank by the plaintiff were intended to have effect on shares not in this but in another Company. To repeat the language of *Parke, B.*, "but for the occurrence of a very extraordinary event," namely, the forgery and felony of the plaintiff's agent, the act of the plaintiff could not have had any effect on the shares now in question. If there was negligence at all, that negligence had reference to the shares of the plaintiff in the Scottish Australian Investment Company.

By the felonious act of another, which could not have

(a) 5 H. L. 410.

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been within the contemplation of the plaintiff, or have been calculated upon as likely to flow out of that which plaintiff did, the negligence of the plaintiff, if any, was converted into the means of committing a fraud in respect of these shares.

The proximate cause of the fraud perpetrated was the forgery and felony of the agent, and his fraudulent conduct in converting deeds intended to operate on shares in one Company into the means of disposing of shares in another.

It is to be observed that, in the case in the House of Lords to which I have referred, it was unnecessary to decide the larger question, whether negligence leading to a forgery by which another party was defrauded estops the party guilty of it from disputing the genuineness of the instrument. The absence of negligence immediately leading to the result was at once a sufficient ground on which to dispose of the case. In *Taylor v. The Great Indian Peninsular Railway Company (a)*, where transfers had been executed in blank as to the particular shares, and the blanks had been fraudulently filled up by the broker with shares not intended by the transferor, and the shares had been sold, the Lords Justices held on appeal confirming the decision of Vice Chancellor *Wood*, that the transfer was void, and that the original owner was entitled to have the shares delivered up and their registration in the name of the purchaser restrained. That case is in point to the present, and, in my opinion, is an important authority in support of the view I have taken in this case.

Judgment affirmed.

(a) 4 De Gex & J. 559.

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## IN THE EXCHEQUER CHAMBER.

*(Appeal from the Court of Exchequer.)*

SHEEN v. BUMPSTEAD.

May 14.

**T**HIS was an appeal by the plaintiff against the decision of the Court of Exchequer in discharging a rule for a new trial on the ground of the improper reception of evidence. The pleadings and facts fully appear in the report in the Court below: 1 H. & C. 358.

*D. D. Keane* (with whom was *O'Malley*) argued for the plaintiff (*a*).—First, the question put to the witness Adams, whether, to his belief, Watson was, on the 24th October, 1860, trustworthy, was inadmissible. [*Blackburn, J.*—The plaintiff adduced evidence to prove that the defendant made the representation *knowing* it to be false. Then the defendant's shopman, who was acquainted with all the transactions between the defendant and Watson, is asked as to his belief respecting the trustworthiness of Watson: that is some evidence for the jury in arriving at the conclusion whether or no the defendant acted *bonâ fide*.] It is immaterial what was the belief of the witness, unless it was communicated to the defendant. [*Cockburn, C. J.*—The plaintiff gave evidence of certain facts, from which he asked the jury to infer that the defendant knew that Watson was not trustworthy. Then the defendant called a witness, who, from his knowledge of the transactions between the defendant and Watson, was competent to form an opinion, and who stated that, in his belief, Watson was trustworthy. That is

In an action for falsely representing that W., a tradesman, was trustworthy, the defendant called as a witness his counterman, who was acquainted with the transactions between the defendant and W., and asked him: "Was W. at the time of the representation trustworthy to your belief?" The defendant also called four tradesmen of the same town, who were asked as to the general reputation of W. for trustworthiness.—*Held*, in the Exchequer Chamber (affirming the judgment of the majority of the Court of Exchequer), that the evidence was admissible.

(*a*) Before *Cockburn, C. J., Crompton, J., Willes, J., Byles, J., Blackburn, J., Keating, J., and Mellor, J.*

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admissible evidence, but whether of any weight is a matter for the jury.] 'The question is, what was passing in the mind of the defendant at the time he made the representation? not what Adams believed. [*Mellor, J.*—The gist of the case, as regards the scienter, rests on the transactions with Watson, and the witness Adams was the person who conducted them, and therefore competent to form an opinion as to his trustworthiness.] It may be that the defendant knew that Watson was not trustworthy, and yet the jury are asked to infer that he was because another person said that he believed it. [*Cockburn, C. J.*—In a mercantile transaction, circumstances which would induce a certain belief in the mind of one man would very likely produce the same result in the mind of another, equally competent to form an opinion. The relative weight of the testimony of Adams and the fact of Watson's bankruptcy was a matter for the jury.] Upon the plaintiff's evidence, it must be assumed, for the purpose of this question, that Watson was not trustworthy, and the defendant was bound to shew that he was not aware of it. This is an attempt to substitute the belief of Adams for that of the defendant. If Adams had been asked "what inference do you draw from the transactions with Watson, as to his trustworthiness," the question might have been free from objection. [*Blackburn, J.*—It was competent for the defendant to rebut the inference which the jury were called upon to draw from the plaintiff's evidence by calling a witness, who, knowing the transactions with Watson, said that in his belief Watson was trustworthy.] The evils resulting from the admission of such evidence are pointed out by *Bramwell, B.*, in his judgment (a) in the Court below.—Secondly, the evidence of the witnesses as to the general reputation of Watson was not admissible. The issue was whether the defendant believed that Watson was trustworthy, and the opinion of four tradesmen in the

(a) 1 H. & C. 364.

town is no evidence of his belief. In *Shannon v. B.* the  
the conversations objected to were admitted as evidence  
because they had been communicated to the defendant.

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Baker (with whom was Cherry) suggested a similar rule, but was not called upon to argue.

COCKBURN, C. J.—I am of opinion that the evidence objected to was admissible, and that the judgment of the Court below ought to be affirmed.

The case resolves itself into two parts: one as to the admissibility of the question put to Adams, the defendant's counterman: "Was Watson on the 24th of October, 1860, trustworthy to your belief?" the other as to the admissibility of the question put to the other witnesses, fellow-townsmen of Watson, as to his general reputation for trustworthiness as a tradesman. With respect to the first part, the objection is to the form of the question, the witness being asked as to *his belief*; and certainly at first sight it might seem open to objection on that ground. But the plaintiff, in order to shew that Watson was not only not trustworthy at the time mentioned, but not trustworthy to the knowledge of the defendant, gave evidence of certain circumstances from which the jury were asked to infer that at the time the defendant wrote the letter of the 24th October, 1860, he knew that Watson was not trustworthy. In answer to the plaintiff's case the witness Adams is called, and in order to rebut the inference sought to be raised, is asked whether, knowing of all the transactions between the defendant and Watson, he believed that Watson was trustworthy. It is in effect, "What impression did these transactions produce on your mind?" In my judgment, that was a legitimate question, and one which the defendant had a right to put.

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With regard to the question put to the other witnesses respecting the general reputation of Watson for trustworthiness as a tradesman, I think it also admissible. It was important to ascertain the state of mind of the defendant at the time he made the representation complained of, and that could only be shewn by inference. A plaintiff may not be able to bring home to the defendant by direct and positive evidence a knowledge of the falsehood of his representation; the plaintiff may, however, prove certain facts which necessarily lead to that inference. Now, suppose the plaintiff had called every tradesman in the town to say, not only that Watson was insolvent, but that his insolvency was notorious, would it not have been a fair and obvious remark to the jury, that the defendant must have known what was the common knowledge of every other tradesman? On the other hand, if, after the plaintiff has established a *prima facie* case against the defendant, the latter calls a number of tradesmen, who have had dealings with Watson, and they say that at the time the defendant made the representation, they believed that Watson was perfectly solvent, is not that strong evidence—morally at least—from which the jury may infer that what was the common opinion of tradesmen in the neighbourhood was shared by the defendant, and that in making the representation he acted in good faith. I should hesitate before I held such evidence inadmissible in point of law. It would clearly have been admissible if it had tended to shew that every tradesman, who had contracted with Watson, believed him to be solvent. It is true that the defendant only called four or five persons who had dealings with Watson, but that is a matter for the jury, and goes only to the weight of the evidence and not to its admissibility.

The rest of the Court concurred.

Judgment affirmed.

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## IN THE EXCHEQUER CHAMBER.

(Appeal from the Court of Exchequer.)

YOUNG v. DAVIS and Another.

May 14.

THIS was an appeal against the decision of the Court of Exchequer in making absolute a rule to enter a nonsuit, pursuant to leave reserved at the trial. The pleadings and facts sufficiently appear in the report of the case in the Court below: 7 H. & N. 760.

No action lies against a surveyor of highways appointed under the 5 & 6 Wm. 4. c. 51, for damage resulting from an accident caused by his neglect to repair the highway.—So held in the Exchequer Chamber (affirming the judgment of the Court of Exchequer.)

*Dowdeswell* now argued for the plaintiff (a).—The argument was, in substance, the same as that in the Court below. The following additional authorities were cited: *Keighley's Case* (b); *Parnaby v. The Lancaster Canal Company* (c); *Gibbs v. The Liverpool Dock Company* (d); *The Mersey Dock Board v. Penhallow* (e); *Ruck v. Williams* (f); *Meek v. The Whitechapel Board of Works* (g); *Caswell v. Worth* (h); *Doel v. Sheppard* (i); *Nicholl v. Allen* (k).

*Mellish* appeared for the defendants, but was not called upon to argue.

(a) Before *Cockburn, C. J., Crompton, J., Willes, J., Byles, J., Blackburn, J., Keating, J., and Mellor, J.*

(b) 10 Rep. 139 a.

(c) 11 A. & E. 223.

(d) 3 H. & N. 164.

(e) 7 H. & N. 329.

(f) 3 H. & N. 308.

(g) 2 F. & F. 144.

(h) 5 E. & B. 849.

(i) 5 E. & B. 856.

(k) 1 B. & S. 916.



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WILLES, J.—We are all of opinion that the judgment of the Court of Exchequer upon the question of liability was right, and in that opinion my Lord Chief Justice and my brother *Crompton* expressed their concurrence before leaving the Court.

Mr. *Dowdeswell* properly admitted that but for the statute no action would have been maintainable against the parish or its servants for a mere omission to repair. The remedy would have been by indictment only against the parish at large. It must be contended therefore that the concluding part of section 6, that the surveyor should keep the roads in repair, &c., has the effect of giving an action against him, and Mr. *Dowdeswell* has rested his argument upon the effect of those words, as if they stood alone. It is not, however, a proper mode of construing statutes to take an isolated sentence and discuss its effect, without looking to all the provisions of the Act, with a view to discover its leading object and intention, by the light of which all its parts may be properly understood. Now this act of parliament, so considered, appears not to have been passed for the purpose of creating a new liability either in the parish or any other persons, but simply in order to provide machinery whereby the existing duty of the parish to repair may be conveniently fulfilled. With this view it authorizes the parish to appoint their surveyor whose duties it defines by, amongst others, the 6th section. The duty of the parish to the public, enforceable by indictment, not by action, remains. The duty of the surveyor, created by the Act is, not to the public, but to the parish which employs him to do for them what they are bound to do; and for the breach of such duty to the parish the Act provides a penalty, not an action nor an indictment. To read the act of parliament as creating a duty in the surveyor to a class more extensive than the parish which

employee him, would introduce an element of uncertainty as to the scope of the rule, and it is not imposed upon a servant for a mere request to do an act which in respect of which no further suit or action is in the particular mode of proceeding, respectively.

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That was one of the grounds upon which the judgment of the Court of Exchequer proceeded, and as we think it sound the judgment must be affirmed.

We express no opinion upon the question of law, as it has properly been arranged by counsel for the respective parties.

By consent of counsel, a *sci. processus* was entered.

a) Discussed in the course of his argument submitted, that the Court of Exchequer ought not to have made the rule absolute to enter a nonsuit, inasmuch as the facts alleged in the declaration were proved at the trial; and that if the action was not maintainable, the declaration was bad on the face of it, and the Court

of Exchequer ought to have reversed the judgment, instead of directing a nonsuit to be entered. Whereupon, on the suggestion of the Court, the respective counsel agreed that if the Court should be of opinion that the action was not maintainable a *sci. processus* should be entered.



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June 6.

TURLEY v. BATES.

If, upon a contract for the sale of goods, anything remains to be done by the buyer, such as weighing, measuring, or testing the goods, if it appears by the terms of the contract that it was the intention of the parties that the property should pass to the buyer, it will pass though he has not done the act.

Therefore where the plaintiff sold to the defendant a quantity of fire clay at a certain price per ton, the clay to be carted away by

the defendant, at his own expense, and weighed by him at the weighing machine of a third person:—*Held*, that the property in the clay passed to the defendant on the completion of the bargain, and that the plaintiff might recover the price under a count for goods bargained and sold, although the clay had never been weighed.

THE declaration contained a special count, alleging that the plaintiff bargained and sold, and the defendant bought from the plaintiff, a quantity of fire clay then deposited on certain land of the plaintiff, at the price of two shillings per ton, upon the terms that the defendant should take away the goods and pay for the same within a reasonable time. It then, after averring that all conditions had been fulfilled to entitle the plaintiff to have the goods taken away and accepted by the defendant, and that the defendant took away and accepted a part of the goods under the contract, alleged as a breach that the defendant would not take away and accept the residue of the said goods, or pay for the same, whereby the plaintiff lost the price and profit he would have made.

The declaration also contained counts for goods bargained and sold, goods sold and delivered, and on an account stated.

The defendant, as to the first count, pleaded a denial of the buying and selling, and of the plaintiff's readiness to

deliver and suffer the defendant to take away the residue. To the rest of the declaration he pleaded, never indebted, and a set-off.

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The cause was tried, before *Channell*, B., at the Middlesex Sittings after last Easter Term, when the following facts appeared (as stated in the judgment, *post*, p. 207).—The plaintiff was an Iron and Coal Master at Coseley in Staffordshire. In the year 1854, and between that and the year 1857, he excavated and raised from his colliery, the Coseley Moore Colliery, a quantity of fire clay. This clay was stacked in a heap on land of the plaintiff near to the bank of his colliery. Before December, 1860, a portion of this heap had been sold and removed. In that month a quantity, estimated by the plaintiff at about 1500 tons, still remained stacked in the heap. The defendant had before this time bought of the plaintiff, and carted and carried away, portions of the heap. On several occasions, in December, 1860, the plaintiff and defendant met, and a bargain was come to with respect to the clay. This bargain was on some points differently represented by the evidence for the plaintiff and by that of the defendant.

According to the case for the plaintiff the bargain concluded was for the sale and purchase of the entire heap as then stacked, at the price of two shillings per ton; the plaintiff being willing to take that price, instead of a higher one which he had demanded, provided the whole heap was taken away, so that the ground might be cleared: that the defendant was at his own expense to load and cart it away; and that the clay, when on its way to the defendant's premises, was to be weighed at a weighing machine belonging to one Johnson, which machine the defendant's carts would pass on their way; and that the defendant was to pay for the weighing.

It was not denied, on the part of the defendant, that a bargain was made to pay for such clay as he might take away at

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the rate of two shillings per ton, nor that such clay was to be carted and weighed *at his own expense*; but it was contended by the defendant that the bargain was not for the whole heap as it stood, but only for such portion of the clay as the defendant chose to send for and cart away, and after having it weighed at Johnson's machine, to pay for it at the rate aforesaid. No point was made, on the Statute of Frauds, that the contract was not in writing—whether the verbal bargain was for the whole or for only a portion of the stack was the principal question in the cause. It was, however, further contended by the defendant that whatever the quantity contracted to be bought, it was bought on a warranty by the plaintiff that the clay would stand a red heat.

After the bargain the defendant at different times, as he thought fit, carted away portions of the clay, in the whole about 270 tons. On the three or four first occasions of carting away, the clay was weighed at Johnson's machine. On one occasion, the last, and without any notice to the plaintiff, clay was loaded by the defendant's servants and carted away in an opposite direction to the weighing machine, and such clay was taken to a canal where it was loaded into a boat and taken by water carriage to Liverpool. The plaintiff, whilst the defendant's men were carting this last clay, saw them and followed them, and the clay was guaged on the barge in the plaintiff's presence at twenty-two tons.

Evidence<sup>1</sup> was given, on the part of the defendant, that the clay which had been taken away by him had been used in his business, and did not answer the warranty alleged to have been given. On this ground also he denied his liability to take or pay for more than had been removed. This evidence became immaterial, as the learned Judge ruled there was no evidence of a warranty.

All the clay so taken away by the defendant had either

been paid for before action brought or was covered by a set-off.

The learned Judge left to the jury the question what was the bargain ; and they found, for the plaintiff, *that the bargain was a bargain for the whole*. It was then further objected by the defendant, that, assuming that the verbal bargain was for the sale of the whole of the stack of clay, and further that there was no defence on the ground of warranty, yet, as the clay sought to be recovered for *had never been weighed at Johnson's machine*, the count for *goods bargained and sold* could not be maintained ; and that, in the absence of any evidence of any fall in the value of clay or other loss by reason of not taking it away, the plaintiff could at most, recover only nominal damages.

No evidence of any actual loss or damage was given and a verdict was then entered for the plaintiff, by consent, for the sum of 112*l.* 10*s.* 6*d.*, as the estimated value of the clay not removed, at the contract price of two shillings per ton : leave being reserved to the defendant to limit the verdict to the first count, and to nominal damages on that count in case this Court should be of opinion that the plaintiff was only entitled to recover on that count.

In last Easter Term a rule for a new trial, on the ground of misdirection on the point of warranty, was applied for and refused ; but a rule nisi was granted, pursuant to the leave reserved, to limit the verdict to the first count and reduce the damages to nominal damages ; against which

*Pigott*, Serjt., and *H. James* shewed cause in the present Term (June 6).—The question is whether the property in the clay passed to the defendant, so as to entitle the plaintiff to recover the agreed price under the count for goods bargained and sold. The rule of law is clear that where, on a contract of sale, anything remains to be done on the part of

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the *seller*, until that is done the property does not vest in the buyer: *Simmons v. Swift* (a). In *Hanson v. Meyer* (b), by the particular terms of the contract the price was made to depend on the weight of the goods, and therefore, until their weight was ascertained, the buyer had no right of property in them. But in this case, by the terms of the contract, the defendant was to cart away the clay at his own expense, and weigh it at the weighing machine of a third person. [*Channell, B.*, referred to *Gilmour v. Supple* (c).] Nothing remained to be done on the part of the plaintiff, and the defendant had a right to the possession of the clay, the weight of which was to be ascertained by him. Suppose a butcher bought an ox in a field, under a contract that when killed he should ascertain its weight, and he afterwards took the ox away and killed it, could it be said that no property vested in him until it was weighed. [*Martin, B.*—That is merely the same question in another form.] In *Gilmour v. Supple* (c), Sir C. Cresswell, in delivering the opinion of the Court, said:—"By the law of *England*, by a contract for the sale of specific ascertained goods, the property immediately vests in the buyer, and a right to the price in the seller, unless it can be shewn that such was not the intention of the parties." Here, by the terms of the contract, the parties intended that the property in the clay should pass to the defendant before it was weighed, because the defendant undertook to remove and weigh it. Could the plaintiff retake possession of it because it was not weighed? In *Blackburn on Contract of Sale*, p. 151, it is said that the rules "are twofold: the first is that where, by the agreement, the vendor is to do anything to the goods for the purpose of putting them into that state in which the purchaser is to be bound to accept them, or, as it is sometimes worded, into a deliver-

(a) 5 B. &amp; C. 857.

(b) 6 East, 614.

(c) 11 Moo. P. C. 551.

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able state, the performance of those things shall (in the absence of circumstances indicating a contrary intention) be taken to be a condition precedent to the vesting of the property. The second is, that where anything remains to be done to the goods for the purpose of ascertaining the price as by weighing, measuring, or testing the goods, where the price is to depend on the quantity or quality of the goods; the performance of these things, also, shall be a condition precedent to the transfer of the property, although the individual goods be ascertained, and they are in the state in which they ought to be accepted." In *Rugg v. Minett* (a) and *Zagury v. Furnell* (b) something remained to be done by the sellers to ascertain the amount of the price, and that not having been done, the goods, which were destroyed by fire, remained at the seller's risk. But where the buyer, for his own satisfaction, has the option of weighing the goods, but the seller has no such privilege or duty, the sale is complete, and the property transferred to the buyer as soon as the bargain has been concluded: *Swanwick v. Sothern* (c). Suppose the defendant had taken away and sold all the clay, would it have been any answer to an action for the price that he had never weighed it? [*Bramwell*, B.—Suppose a contract for the supply of gas at so much per cubic foot, the gas would be consumed before the quantity was ascertained, and could it be said that until that was done the property did not pass? [*Martin*, B.—Was not the defendant a wrong-doer in taking the goods without weighing them?] If so, the plaintiff may waive the tort and sue for their price.

*Overend and Quain*, in support of the rule.—It is immaterial whether the act is to be done by the buyer or seller;

(a) 11 East, 210.

(b) 2 Camp. 240.

(c) 9 A. &amp; E. 896.



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so long as anything remains to be done for the purpose of ascertaining the price of the goods or their weight, or measurement, the right of property and risk of loss are not altered: Addison on Contracts, p. 223, 4th ed.; *Gilmore v. Supple* (a). The French Code prescribes the same rule of law: Code Civil, Liv. III., Tit. VI., Chap. I, Art. 1585 (b), 1586 (c), 1587 (d). If it appears by the terms of the contract that the intention of the parties was that no property should pass until something was done, it will not pass. In *Gilmore v. Supple* (a) Sir C. Cresswell said, "Another rule may be extracted from the case of *Rugg v. Minett* (e), namely, that where the seller is to do some act for the benefit of the buyer, to place the goods sold in a state to be delivered, until he has done it the property does not pass . . . So, also, if an act remains to be done by or on behalf of both parties before the goods are delivered, the property is not changed; of which *Wallace v. Breeds* (f) furnishes an instance." Therefore it is a question of intention. In the case put of gas to be supplied at so much the cubic foot, it is evident that the quantity could not be ascertained until the gas was consumed, and therefore the intention was that the property should pass. In Kent's Commentaries, vol. 2, Part V., Lec. XXXIX., s. 495, 10th ed., it is said, "It is a fundamental principle pervading everywhere the doctrine of sales

(a) 11 Moo. P. C. 551.

(b) 1585. "Lorsque des marchandises ne sont pas vendues en bloc, mais au poids, au compte, ou à la mesure, la vente n'est point parfaite, en ce sens que les choses vendues sont aux risques du vendeur jusqu'à ce qu'elles soient pesées, comptées, ou mesurées; mais l'acheteur peut en demander ou la deliverance ou des dommages-intérêts, s'il y a lieu en cas d'inexécution de l'engagement."

(c) 1586. "Si, au contraire, les marchandises ont été vendues en bloc, la vente est parfaite quoique les marchandises n'aient pas encore été pesées, comptées ou mesurées."

(d) 1587. "A l'égard du vin, de l'huile et des autres choses que l'on est dans l'usage de goûter avant d'en faire l'achat, il n'y a point de vente tant que l'acheteur ne les a pas goûtées et agréées."

(e) 11 East, 210.

(f) 13 East, 522.

of chattels, that if the goods of different value be sold in bulk, and not separately, and for a single price, or *per aver- sionem*, in the language of the civilians, the sale is perfect and the risk with the buyer; but if they be sold by number, weight, or measure, the sale is incomplete, and the risk continues with the seller, until the specific property be separated and identified." The rule is stated in similar terms by Troplong in his *Commentary on the Droit Civil*, Chap. 1, "De la Vente" (Art. 1585), s. 90 (a).—They also cited from Blackburn on *Contract of Sale*, p. 177, the extract from Pothier, "Du Contrat de Vente," partie iv., and the judgment of *Littledale, J.*, in *Simmons v. Swift* (b).

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The judgment of the Court was delivered, in the following Michaelmas Vacation (December 6), by

CHANNELL, B.—This was an action tried before me at the Middlesex Sittings, in last Easter Term.—(His Lordship then stated the pleadings, and proceeded).—At the trial a verdict was found for the plaintiff, damages 112*l.* 10*s.* 6*d.*, with leave reserved to the defendant to move to reduce the verdict to nominal damages on the ground hereinafter mentioned.—(His Lordship then stated the facts as above set forth, p. 201). This rule was argued before the Lord Chief Baron, my brother *Bramwell*, and myself.

For the plaintiff it was contended, that where full authority was given to the buyer to remove the clay sold, and all that the seller had to do according to the contract was com-

(a) "Le prix est incertain tant que le mesurage n'a pas fait connaître le détail de la quantité vendue. Or, l'incertitude dans le prix rend la vente conditionnelle, lorsque, pour passer de l'in-

certain au certain, il faut remplir une condition telle que celle du comptage, du mesurage ou du pesage."

(b) 5 B. & C. 857. 864.

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plete, and where everything that remained to be done was to be done by the buyer at his own expense, viz., as in this case, to cart away and have the clay weighed at his own expense, it must be taken as if there had been such a bargain and sale as to pass the property though the clay had not been removed and weighed, and that the contract price might be recoverable on the count for goods bargained and sold.

For the defendant it was contended, that taking the case on the plaintiff's evidence, and as found by the jury, that there had been a removal and weighing of part of the clay, yet no property passed in any clay until the clay had been weighed at Johnson's machine and the quantity and price thus ascertained, so as to entitle the plaintiff to recover on the count for goods bargained and sold.

In the course of the argument for the defendant we were referred to several cases decided in our Courts which were said to govern the question, and to a passage from my brother *Blackburn's* Treatise on Contract of Sale, part 2, chap. 2, p. 152. It was argued that the rule deducible from these authorities was, that so long as a price had been agreed upon according to quantity, to be ascertained by weighing, that until the goods had been weighed and the price so ascertained the contract was incomplete; which rule it was said was in accordance with the rule given in Pothier Contr. de Vente, with Kent's Commentaries, vol. 2, p. 405, s. 309, New York Edition, 1849, the Code Civil, Liv. III., Tit. VI., Chap. 1., Art. 1585, 1586, 1587.

The rule as stated in Blackburn on Contract of Sale, p. 152, is, "That where anything remains to be done to the goods for the purpose of ascertaining the price, as by weighing, measuring, or testing the goods where the price is to depend on the quantity or quality of the goods, the performance of these things, also, shall be a condition precedent to the transfer of the property, although the indi-

ritish goods be ascertained, and they are in the state in which they ought to be accepted."

After adverting to the rule as one wholly adopted from the civil law, the learned author at page 155 says:—"In general, the weighing, &c., must from the nature of things be intended to be done before the buyer takes possession of the goods, but that is quite a different thing from intending it to be done before the vesting of the property: and as it must in general be intended that both the parties shall concur in the act of weighing when the price is to depend on the weight, there seems little reason why, in cases where the specific goods are agreed upon, it should be supposed to be the intention of the parties to render the delay of that act, in which the buyer is to concur, beneficial to him. Whilst the price remains unascertained, the sale is clearly not for a certain sum of money, and therefore does not come within the civilian's definition of a perfect sale, transferring the risk and gain of the thing sold; but the English law does not require that the consideration for a bargain and sale should be in monies numbered provided it be of value."

The learned author, however, considered the rule he mentions to prevail here, and to rest upon the authority of the English decided cases. Several cases are then cited in the Treatise: *Hanson v. Meyer* (a); *Hinde v. Whitehouse* (b); *Rugg v. Minett* (c); *Zagury v. Furnall* (d); *Simmons v. Swift* (e); *Laidler v. Burlinson* (f); *Tripp v. Armitage* (g). The author further observes, "That if it appear from the agreement that the intention of the parties is that the property shall pass presently, the property does pass, though

(a) 6 East, 614.

(b) 7 East, 558.

(c) 11 East, 210.

(d) 2 Camp. 240.

(e) 5 B. & C. 857.

(f) 2 M. & W. 602.

(g) 4 M. & W. 687.

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there remain acts to be done by the vendor before the goods are deliverable:" citing *Wood v. Russell* (a); *Clarke v. Spence* (b).

It is very doubtful whether in stating the rule to be that where anything remains to be done to the goods for ascertaining the price as weighing, &c., the performance was a condition precedent to the transfer of the property, it was meant by the learned author to include a case where all that remained to be done was to be done by the buyer with full authority from the seller to do the act.

In *Hanson v. Meyer* the weighing was to precede the delivery, and was a condition precedent to the purchaser's right to take possession and to a complete present right of property. In *Hinde v. Whitehouse*, which was a case of a sale by auction, it was held that though the duties to the Crown remained to be paid by the seller before possession could be had by the buyer, the property passed from the time of sale; the words of the conditions shewing that intention. In *Rugge v. Minett* a duty remained to be performed by the sellers; and Lord *Ellenborough* stated the test be "whether everything had been done by the sellers which lay upon them to perform in order to put the goods in a deliverable state;" and Mr. Justice *Bayley*, in effect, adopted the same test. *Zagury v. Furnall* is an authority to the same effect. There it was the duty of the seller to count the skins in each bale, and the price was for a certain sum per dozen skins. In *Simmons v. Swift*, the authority most in point for the defendant, it was a part of the contract there for the sale of a stack of bark at 9*l.* per ton, that the *bark should be weighed, and the concurrence of the seller in the act of weighing was necessary.* *Bayley, J.*, after stating the general principle says:—"If anything remains to be done on the part of the seller, until that is done the property is not changed.

(a) 5 B. &amp; A. 942.

(b) 4 A. &amp; E. 448.

From a consideration of these cases, it appears that the principle involved in the rule above quoted is, that something remains to be done by the *seller*. It is, therefore, very doubtful, as before stated, whether the present case comes within the principle of the rule. But, however that may be, it is clear that this rule does not apply if the parties have made it sufficiently clear whether or not they intend that the property shall pass at once, and that their intention must be looked at in every case. This is clearly laid down in the case of *Logan v. Le Mesurier* (a), and in *Hinde v. Whitehouse* (b), cited *supra*, and in Blackburn on Contract of Sale, p. 151.

In the present case the jury have, in effect, adopted the plaintiff's version of the bargain, by their finding that it was for the whole heap. And taking that view of the case, it seems to us clear that the intention of the parties was that the property in the whole heap should pass, notwithstanding the clay was to be weighed at Johnson's machine; and we, therefore, think that the rule to reduce the damages must be discharged.

Rule discharged (c).

(a) 11 Moo. P. C. C. 116.

(b) 7 East, 558.

(c) See *Woodley v. Coventry*, *antè*, p. 164.

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May 27, 30, **KNAPP v. THE LONDON, CHATHAM AND DOVER RAILWAY COMPANY.**

To a count framed on the 68th section of the Lands Clauses Consolidation Act, 1845, alleging that the defendants, a railway Company, having taken the plaintiff's house for their works, made default in issuing their warrant to the sheriff to summon a jury for settling the compensation, whereby they became liable

to pay the amount claimed, the defendants pleaded, that the plaintiff had no greater interest in the house than as tenant from year to year; to which the plaintiff replied that he was never required to give up possession of the house, and that the defendants without his consent entered upon and took it, without any notice to him.—*Held*, on demurrer to the plea and replication, that the plea was good, since the plaintiff, having no greater interest in the house than as tenant from year to year, was not entitled to have the compensation claimed settled by a jury, but could only obtain it by the determination of justices under the 121st section.

To a count for entering the plaintiff's house and ejecting and expelling him therefrom, the defendants pleaded that the house was delineated on the plans and described in the books of reference deposited as in their Act mentioned, and that it was necessary to take and use the house for the purposes of that Act: that they entered and took possession of the house with the consent of the owners and occupiers thereof, and after such entry and possession taken the plaintiff took possession of the house and occupied the same, and the defendants, because it was necessary for the construction of their works authorized by that Act, entered the said house, the plaintiff not then being therein, and pulled down the same.—*Held*, on demurrer, that the plea was good, for the defendants having entered with the consent of the owners and occupiers of the house could not afterwards be treated as trespassers.

To a count alleging that the plaintiff was entitled to support for his house from an adjoining house, and that the defendants wrongfully deprived the plaintiff of the support of the adjoining house, by negligently and improperly pulling down the same, without taking any care to secure the plaintiff's house against the consequences of such pulling down, the defendants pleaded (except as to so much of the count as charged them with having negligently and improperly pulled down the adjoining house) that the same was delineated in the plans and described in the books of reference deposited as in their Act mentioned; and that because it was necessary in order to make the railway authorized by that Act they pulled down the said house.—*Held*, on demurrer, that the plea was good.

the plaintiff desiring to have the same determined by the verdict of a jury, gave notice in writing to the defendants, being the promoters of the undertaking, of such his desire, and stated in such notice the nature of his interest in the said messuage, tenement, and hereditaments in respect of which he claimed compensation and the amount of the compensation so claimed, and the defendants were not willing to pay the amount of compensation so claimed, and did not enter into any written agreement for that purpose within twenty-one days after the receipt of the said notice; and the defendants did not within twenty-one days after the receipt of such notice issue their warrant to the sheriff to summon a jury for settling the said compensation in manner provided by the Lands Clauses Consolidation Act, 1845, but therein made default, and thereby became liable to pay to the plaintiff the amount of compensation so claimed as aforesaid; nevertheless, although before suit everything had happened necessary to entitle the plaintiff to payment by the defendants to him of the said amount, to wit, 150*l.*, no part thereof hath been paid.

Second count.—That the defendants took and entered the plaintiff's messuage or dwelling-house, situate and being at 4, Union Place, in the parish and county aforesaid, and ejected and expelled the plaintiff therefrom, and pulled down and destroyed the said messuage or dwelling-house, and converted and disposed of the materials thereof to their own use.

Fourth count.—That the plaintiff was possessed of a messuage or dwelling-house adjoining a certain other house, and was entitled to support for his said house from the said adjoining house; and the defendants wrongfully deprived the plaintiff of the support of the said adjoining house, to wit, by negligently and improperly pulling down and prostrating the same, without taking due or any care or precaution whatever to support or secure the said house of the

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plaintiff against the consequences of such pulling down and prostrating as aforesaid: whereby the plaintiff's said messuage or dwelling house was rendered dangerous and uninhabitable, and fell down, and the plaintiff, together with his family, were compelled to quit the same, and the plaintiff was thereby put to expense by necessarily procuring another habitation for himself and his said family, &c.

Plea to first count.—That the plaintiff, at the times when the notice was given, and the messuage, tenements and hereditaments taken, as in that count mentioned, had no greater interest therein than as a tenant for a year, or from year to year.

Fifth plea to second count.—That the said messuage or dwelling house was delineated on the plans, and described in the books of reference deposited as in the London, Chatham and Dover Act, 1860, mentioned; and it was necessary to enter upon, take and use the same for the purposes of that Act.—Averments: that before the grievances in the second count mentioned, the defendants entered and took possession of the said messuage or dwelling house in the first count mentioned, with the consent of the owners and occupiers thereof, and after such entry and possession taken, the plaintiff took possession of the said messuage, and occupied the same; and the defendants, because it was necessary for the construction of the works, to wit, the city section of the railways in that Act described as the Metropolitan Extensions, and authorized by that Act, entered the said messuage or dwelling house, the plaintiff not then being therein, and pulled down and destroyed the same, and converted and disposed of the materials thereof to their own use, as they lawfully might under the provisions of the said Act and the other Acts incorporated therewith: all which acts of the defendants are the grievances in the second count of the declaration complained of.


Eighth plea to fourth count.—Except as to so much of the same as charges the defendants with having negligently and improperly pulled down and prostrated the house adjoining the house of the plaintiff: that the said house so alleged to have been pulled down and prostrated was delineated in the plans and described in the books of reference deposited as in the London, Chatham and Dover Railway Act, 1860, mentioned; and it was necessary, for the purposes of that Act, to enter upon, and take and use the same, and to pull down and prostrate the same.—Averments: that all things were done and happened to entitle the defendants to enter upon the said house, and to take, use, pull down, and prostrate the same; and because it was necessary, as aforesaid, for the construction of the works, and in order to make the railways authorized by the said Act, in the lines and according to the levels defined upon the plans and sections deposited as in the said Act mentioned, they did pull down and prostrate the said house: by reason whereof, the plaintiff's messuage or dwelling-house was necessarily rendered dangerous and uncomfortable, and fell down, as in the fourth count mentioned.


Demurrer to first, fifth and eighth pleas, and joinder therein.

Replication to first plea.—That the plaintiff had not, at any time before the giving of the said notice, been required to give up possession of the said messuage, tenement and hereditaments taken as aforesaid; but the defendants had, without the plaintiff's consent, entered upon and taken, as in the declaration mentioned, the said premises, without any notice to the plaintiff.

Demurrer to replication, and joinder therein.

*Garth*, for the plaintiff (May 27).—The first count of the declaration is founded on the provisions of the 68th section

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of the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18). That section provides for cases in which a party is entitled to compensation "in respect of any lands, or of any interest therein, which shall have been *taken* for, or injuriously affected by the execution of the works, and for which the promoters of the undertaking shall not have made satisfaction." If the compensation claimed exceeds 50*l.*, the party may have the same settled by arbitration, or a jury. If he desires to have the compensation settled by a jury, he may give notice of his desire to the promoters of the undertaking, and, unless they are willing to pay the amount claimed, they must, within twenty-one days after the receipt of the notice, issue their warrant to the sheriff to summon a jury for settling the same, and in default thereof, they become liable to pay the party so entitled the amount of compensation claimed, and the same may be recovered by action in any of the superior Courts. The first plea is framed upon the 121st section, which provides, that "*if any such lands shall be in the possession of any person having no greater interest therein than as a tenant for a year, or from year to year, and if such person be required to give up possession of any lands so occupied by him before the expiration of his term or interest therein, he shall be entitled to compensation for the value of his unexpired term, or interest in such lands,*" &c., "and the amount of such compensation shall be determined by two justices." It is evident that section only applies where the Company has not taken possession of the lands; for it goes on to provide that "upon payment or tender of the amount of such compensation all such persons shall respectively deliver up to the promoters of the undertaking, &c., any *such lands in their possession.*" Not only is this case not within the terms of that section, but it is excluded by the replication, which shews that the plaintiff was never required to give up possession, and that the defendants have entered upon and taken

the land without his consent or notice to him. The 6th section is the first of a series of clauses with respect to the purchase of lands by *agreement*. Then follows a series of clauses with respect to the *purchase* and *taking* of lands otherwise than by agreement. These commence with the 16th section; and the 23rd provides for cases where the compensation claimed exceeds 50*l.*, and the Company have not taken possession of the lands. In that case, if the compensation is to be determined by a jury, the promoters of the undertaking are required, by the 39th section, to issue their warrant to the sheriff to summon a jury, but no time is prescribed for that purpose. Where, however, the promoters have taken possession of the lands they are required by the 68th section to issue their warrant for a jury within twenty-one days after the receipt of notice that the party entitled desires to have the compensation settled by a jury. The object of that enactment is to provide a speedy remedy where possession has been taken of the lands; and it is of a penal nature, rendering the promoters liable to pay the compensation claimed in default of compliance with its provisions. By construing the general words of the 68th section, as restricted by the 121st, a tenant from year to year will be deprived of the speedy remedy provided by the 68th, although the promoters have taken possession of the lands. The point now raised was not argued in *Regina v. The Manchester, Sheffield and Lincolnshire Railway Company* (a), but it is conceded that the decision in that case is adverse to the plaintiff.

Secondly, the plea to the second count is bad. It, in substance, alleges that the Company were authorized by their act of parliament to take possession of the plaintiff's house, and that they did so with the consent of the owners and occupiers: that afterwards the plaintiff took possession of and

(a) 4 E. & B. 88.

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occupied the house, and that the defendants, because it was necessary for the construction of their works, pulled it down. The plea does not state that the plaintiff took possession *wrongfully*, and therefore it must be assumed that his possession was rightful. The plea amounts to this, that whilst the plaintiff was in lawful possession of the house the defendants pulled the house down. It is consistent with every allegation in the plea that the defendants let the plaintiff into possession, and that he was their tenant. It is immaterial whether the plaintiff was in the house at the time the defendants pulled it down; it is enough that he was in lawful possession.

Thirdly, the plea to the fourth count is bad. That count alleges that the plaintiff was entitled to support for his house from the adjoining house, "and that the defendants wrongfully deprived the plaintiff of the support of the said adjoining house, to wit, by negligently and improperly pulling down and prostrating the same, without taking due or any care or precaution whatever to support or secure the said house of the plaintiff." The plea to that count excepts so much of it as charges the defendants with having negligently and improperly pulled down and prostrated the house adjoining the house of the plaintiff. But, in excepting "negligence," the defendants have excepted the whole gist of the count.

*Bovill* (*F. M. White* with him), for the defendants (*a*).—The plea to the second count is good. The defendants had a title conferred on them by their act of parliament, which enabled them to take possession of and pull down the house. The only restriction was that they should not do so until they paid for it, or obtained the consent of the owners and


(*a*) He was requested by the Court to confine his argument to the questions arising on the pleas to second and fourth counts.


occupiers. The plea shews that they took possession with the consent of the owners and occupiers. Having obtained that, they cannot afterwards be treated as trespassers. It is said that the plea shews that the plaintiff was in possession; but in every case where *liberum tenementum*, or any other plea of title, is pleaded to an action of trespass, it admits the plaintiff's possession. If the plaintiff relies upon an existing tenancy, that fact should have been replied. Or he might have traversed the allegation in the plea that the defendants entered "with the consent of the owners and occupiers," and under that issue have proved that, being tenant, he refused his consent. Upon these pleadings a consent is admitted, and that could not afterwards be revoked so as to render the defendants trespassers: *Doe d. Hudson v. The Leeds and Bradford Railway Company (a)*. [Pollock, C. B.—If the defendants, for the purposes authorized by their Act, took possession of the house with the consent of the owners and occupiers of it, such consent cannot be revoked.]

Then, with respect to the plea to the fourth count, it is framed upon a supposed right to support for the plaintiff's house from the adjoining house; but the plea shews that the defendants had a right under their act of parliament to pull down the adjoining house. The plea is pleaded to the substantive cause of action, viz., depriving the plaintiff's house of its support. The negligently pulling down the house is laid under a *videlicet*, and therefore immaterial; or if intended to form a substantial part of the complaint, two causes of action are combined in one count. [*Wilde, B.*—The count ought to have been objected to at Chambers.]

*Garth*, in reply.—The plea to the second count admits that the plaintiff was lawfully in possession at the time the defendants committed the trespasses. A plea of *liberum*

(a) 16 Q. B. 796.

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tenementum compels the plaintiff to prove by what title he is in possession of the land. [*Pollock*, C. B.—The plea states that the defendants being in possession of the house with the consent of the owners and occupiers, the plaintiff took possession: that was a wrongful taking possession.] It may be that after the defendants had taken possession they found that they were wrong, and then they let the plaintiff into possession. [*Channell*, B.—If the plea had stated that the defendants “*wrongfully*” took possession, your argument would be destroyed. The defendants say that they had a right to enter although the plaintiff was in point of fact in possession.]

With respect to the plea to the fourth count, if the allegation of negligence be struck out of the count, it would disclose no cause of action. [*Channell*, B.—It would be a good count without the allegation of negligence, because it alleges that the plaintiff was entitled to the support of which the defendants wrongfully deprived him.]

POLLOCK, C. B.—We are all of opinion that the pleas are good. With respect to the plea to the first count, it is unnecessary to say more than that the case of *Regina v. The Manchester, Sheffield and Lincolnshire Railway Company* (a) is an authority in support of that plea.

The plea to the second count substantially sets out that it was necessary for the construction of the works authorized by the defendants’ act of parliament that they should take possession of the house, and that they did so with the consent of the owners and occupiers. Then, having that consent, the case of *Doe d. Hudson v. The Leeds and Bradford Railway Company* (b) is an authority that such consent cannot be revoked.

The plea to the fourth count excludes the negligence alleged in that count; and as to all the other matters it is a

(a) 4 E. & B. 88.


(b) 16 Q. B. 796.

perfectly good plea. It seems to me that the plaintiff has joined two distinct causes of action in one count; and the defendant, by excepting from his plea so much of the count as charges the defendants with negligence, has obviated the impediment which the plaintiff created.

For these reasons I think that our judgment ought to be for the defendants.

BRAMWELL, B.—I am of the same opinion. The question raised by the plea to the first count is concluded by authority; and it seems to me that is also the case with respect to the plea to the second count, because it has been held that where the owners and occupiers of a house have allowed a railway Company to take possession of it for the construction of the works authorized by their Act, the former cannot afterwards treat the Company as trespassers. It follows that the defendants having taken possession of this house with the consent of the owners and occupiers, and it being necessary that they should do so for the construction of their works, the plaintiff cannot now treat them as trespassers. If it should be considered desirable to obviate any doubt as to whether the plaintiff was let into possession by the defendants, the plea might be amended by inserting the word “wrongfully,” as suggested by my brother *Channell*.

With respect to the plea to the fourth count, the exception in that plea is not so correctly worded as it might have been. The plea excepts so much of the count “as charges the defendants with having negligently and improperly pulled down and prostrated the house adjoining the house of the plaintiff;” and at one time I thought that the exception included the pulling down and prostrating the house as well as the negligent and improper mode of doing it; but, in order to make sense of the plea, it ought to be understood, (as no doubt was intended) as excepting the negligence and

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impropriety, and admitting and justifying the pulling down and prostrating the house.

CHANNELL, B.—I am also of opinion that the defendants are entitled to judgment. The question which arises on the plea to the first count seems to me concluded by the authority cited, and if the plaintiff is dissatisfied with that decision he can obtain the opinion of a Court of error.

As to the second plea, I also think that the question which arises on that plea is almost concluded by the case of *Doe d. Hudson v. The Leeds and Bradford Railway Company (a)*. If the plea had stated that the house in question was delineated on the plans and described in the books of reference deposited as required by the defendants' act of parliament, and it being necessary for the construction of the works authorized by that Act that the defendants should take possession of the house, they took possession with the consent of the plaintiff, I apprehend that would have afforded a good defence to this count in trespass, for the plaintiff, having consented that the defendants should take possession of the house, could not afterwards maintain trespass against them, but would have to resort to his remedy under the Act. This plea however goes further, and alleges that after the entry and possession of the defendants the plaintiff took possession of the house and occupied the same. If I had framed the plea I should either have omitted that statement altogether or have alleged that the plaintiff *wrongfully* entered. No doubt, the pleader had in his mind the old form of pleading, and considered that the plea, though not amounting to "liberum tenementum," would compel the plaintiff to reply by shewing how he entered and occupied—whether as tenant from year to year or otherwise.

The remaining question is that which arises on the plea

(a) 16 Q. B. 796.

to the fourth count. It seems to me that the count would have been perfectly good if it had omitted the allegation of negligence. But the plaintiff has incorporated that with another cause of action ; and thence arises the difficulty. If the plea had said, "except as to the negligence charged in and about the pulling down and prostrating the house the defendants say," &c., the matter would have been free from difficulty. But mixing up the two allegations has created the doubt. Since, however, special demurrers are abolished, we ought, if possible, to read the plea as a good, not a bad plea.

WILDE, B.—I am of the same opinion.

Judgment for the defendants.

#### KIMBERLEY v. ALLEYNE.

May 26.

THIS was an application for leave to proceed as if personal service of a writ of summons had been effected. It appeared from the affidavits that the clerk of the plaintiff's attorney had made the usual calls and appointments at the defendant's residence, and had left a copy of the writ which was given to the defendant's wife. On the third call he ascertained that the defendant had been removed to a private lunatic asylum. The following day the plaintiff's attorney called at the asylum, and finding that the defendant was there, requested to be allowed either to see him, or to see the medical man who superintended the establishment. He was informed that he must first see the medical man, but that the defendant was in a fit state to receive, and would be allowed to receive a letter on business. He accordingly left a letter for him, enclosing a copy of the writ, and made

The Court has power, under the 15 & 16 Vict. c. 76, s. 17, to allow a plaintiff to proceed as if personal service of the writ of summons had been effected, although the defendant is a lunatic, and will so order, if satisfied that reasonable efforts have been made to effect personal service, and that the writ has come to the defendant's knowledge.

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an appointment to see the doctor of the establishment. This letter was given to the doctor, who however did not keep the appointment. The clerk to the plaintiff's attorney, after several unsuccessful calls at the doctor's private residence, saw him, and learnt from him that, on receiving the copy of the writ, he had informed the defendant of it, and conversed with him on the subject. He further stated that the defendant was in too dangerous a state to be served with legal process, and that the irritation from it might seriously injure his health. He therefore refused to sanction personal service, but said that so far as he was himself concerned he would accept service on the defendant's behalf. The above proceedings had been communicated to the defendant's family solicitor. The plaintiff's attorney and his clerk both deposed that in their belief the writ had come to the knowledge of the defendant.

*Gray*, in support of the motion.—By the 16th section of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), it is enacted that, "The service of the writ of summons, wherever it may be practicable, shall, as heretofore, be personal; but it shall be lawful for the plaintiff to apply from time to time, on affidavit, to the Court out of which the writ of summons issued, or to a Judge; and in case it shall appear to such Court or Judge that reasonable efforts have been made to effect personal service, and either that the writ has come to the knowledge of the defendant, or that he wilfully evades service of the same, and has not appeared thereto, it shall be lawful for the Court or Judge to order that the plaintiff be at liberty to proceed as if personal service had been effected, subject to such conditions as to the Court or Judge may seem fit." The writ has come to the lunatic's knowledge. That fact distinguishes this case from previous decisions. *Holmes v. Service* (a) was decided on the

(a) 15 C. B. 293.

express ground that the statute had not in this respect been complied with. In *Williamson v. Maggs* (a) the Court of Exchequer proceeded upon the authority of *Holmes v. Service*. So also in *Ridgway v. Cannon* (b) the same difficulty existed, and the Court there suggested that it might be obviated by an application for a habeas corpus, if the keeper persisted in his refusal to allow the writ to be served. The law recognises the contract of a lunatic, and allows it to be enforced against him. Why, then, should a lunatic stand in an exceptional position in relation to the service of process in an action? The practical effect of refusing this application would be to bar the plaintiff's recovery. If the Court should hold personal service indispensable it would vest an arbitrary power in the friends of a lunatic. They might collude with friendly creditors, and hold adverse creditors at defiance. [*Wilde, B.*—Under the old practice, if personal service could not be effected, a lunatic might be proceeded against by *distringas*.] No doubt, and the inference to be deduced is, that the legislature had no intention that there should cease to be any substitute for personal service in such cases; otherwise it would have distinctly expressed such an intention.

POLLOCK, C. B.—I am of opinion that leave should be granted to the plaintiff to proceed in this action.

BRAMWELL, B.—I am of the same opinion. That which is in all cases necessary is here shewn, viz., that reasonable exertions have been made to effect personal service. It must further appear, either that the writ has come to the defendant's knowledge, or that he wilfully evades service. Where, therefore, a lunatic defendant has been removed, without any collusion being practised, to some place where

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(a) 28 L. J., N. S. Exch. 5.

(b) Q. B., T. T. 1854.

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the plaintiff is unable either to serve him personally, or to bring the writ to his knowledge, the plaintiff fails to comply with the requirements of the enactment. In *Holmes v. Service (a)*, *Jervis*, C. J., is reported to have said that there is probably an omission in this respect in the Common Law Procedure Act. In this remark I do not concur. In the present case the writ has come to the lunatic's knowledge, and his position is the same as that of any other defendant.

CHANNELL, B., concurred.

WILDE, B.—I am of the same opinion. The case of *Holmes v. Service* in the Court of Common Pleas, which was followed by *Williamson v. Maggs* in this Court, proceeded on the ground that, as no communication could be effected with the lunatic, the case was not brought within the terms of the enactment. In *Holmes v. Service (a)*, *Jervis*, C. J., expressly says that there is no evidence that the writ has come to the knowledge of the defendant. Here, on the contrary, the affidavits shew that the writ has come to his knowledge. The statute has therefore been complied with.

Rule granted.

(a) 15 C. B. 293.

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ROGERS v. HADLEY and Another.

June 4.

**DECLARATION.**—For that the plaintiff, by an agreement dated the 21st of July, 1857, agreed to sell to the defendants, and the defendants bought of the plaintiff, certain bark then harvested in good merchantable condition, and ricked in the forest of Dean, &c., as and where it then stood, at 6*l.* per ton forest weight of 20 cwt. per ton. Twenty per cent. deposit to be paid in cash on Saturday, July the 25th, 1857, and the remaining cash (purchase money) to be paid within fourteen days from the date thereof; the defendants to be allowed a discount of not less than 2*l.* per cent. on the purchase money; the situation of the bark ricks being as mentioned in said agreement.—Breach: although the plaintiff has always performed the said agreement on his part, and the defendants have had the benefit thereof, and the benefit and possession of the bark therein mentioned, and the defendants have paid to the plaintiff the said deposit therein mentioned, and certain other sums amounting with the said deposit to 476*l.* 7*s.* 3*d.*; and all times have elapsed, and all things have happened,

A document purporting to be a contract, signed by the parties, is not necessarily so, and it is competent for either of the parties to shew by parol evidence that it was not their intention, in signing, that it should operate as a contract, and that the real contract between them was not in writing.

The plaintiff, professedly as C.'s agent, sold bark to the defendants at a price to be subsequently ascertained by C. in a manner agreed on, and induced

them to sign a bought note, which described the plaintiff as the seller at an ascertained price per ton, by representing that this price was nominal, and that as the defendants were dealing with the Crown, whose officer C. was, they would incur no risk. A day was fixed by the note on which a deposit of 20 per cent. was to be paid. The plaintiff had, in fact, himself purchased the bark from C. by verbal contract, but had not paid for it. Afterwards, and before the deposit was paid, the plaintiff sent the defendants an invoice, specifying the quantity of the bark, and debiting them, as buyers from himself, with a sum calculated at the price per ton in the bought and sold notes (the real price not having been then ascertained by C.), and requesting them to pay the deposit to C., as originally arranged. The deposit was accordingly paid to C. by the defendants without objection to the basis on which it was computed. The plaintiff subsequently treated the sale as a sale by himself as principal at the price in the bought and sold notes. The defendants thereupon disclosed the whole transaction to C., paid C. the price which he had then ascertained in the manner originally agreed, and took possession of the bark.—*Held*: First, that parol evidence was admissible to shew that the bought and sold notes did not really contain the contract between the parties.

Secondly, per *Channell*, B., and *Wilde*, B., that if the bought and sold notes were to be taken as the contract, this contract was avoided by the plaintiff's fraudulent representations, and that there had been no subsequent election by the defendants to adopt it.

Per *Bramwell*, B., that the plaintiff was estopped from saying he was not C.'s agent, and consequently that the settlement between C. and the defendants was an answer to the action.

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and all conditions have been performed to entitle him to receive the residue of the said purchase money, yet the defendants have not paid the same or any part thereof.—Second count: for goods bargained and sold; and on accounts stated.

Pleas (inter alia).—Firstly, to first count: non assumpsit.

Second, to first count.—That the defendants were induced to enter into the said agreement by the fraud, covin, and misrepresentation of the plaintiff.

Third, to the residue of the declaration.—Never indebted.

Fourth, to the whole declaration.—Payment.

Sixth, to the whole declaration.—For a defence on equitable grounds, that before and at the time of the making of the said agreement the plaintiff had been and was employed to sell the said bark for and as the agent of Sir James Campbell, and on his behalf, at and for the prices which had been paid in the preceding year, that is to say, in the year 1856, for bark of the same kind, together with an additional sum equal to the expenses of carting and ricking the said bark in the then present year; and it had been agreed by and between the plaintiff, as such agent, and the defendants, that the said bark should be sold to them at and for the said prices so paid for the same in the said preceding year, together with a sum equal to the expenses of carting and ricking the same in the then present year; and the plaintiff then represented to the defendants that the said expenses of carting and ricking the same could not then be correctly ascertained, but that the said expenses, added to the said prices, averaged between 5*l.* and 6*l.* for each and every ton of the said bark; and the defendants say that upon such representation of the plaintiff, and at his request, and upon his agreeing with the defendants that they should be liable to pay only such prices, together with such expenses when they were ascertained, they the defendants were in-

duced to and did make the said agreement with the plaintiff in the said first count mentioned, and they were then requested by the plaintiff to pay the said prices and expenses to the said Sir James Campbell; and the defendants further say that, after the making of the said agreement, they discovered and ascertained, as the fact was, that the said expenses, added to the said prices of the said bark, averaged and amounted to much less than 6*l.* per ton, that is to say, averaged and amounted to only 5*l.* 2*s.* per ton, and that they before the commencement of this action paid to the said Sir James Campbell [who then had notice of the premises (*a*)] the whole amount due for the said bark at the said prices, together with the said expenses so ascertained as aforesaid, and the said Sir James Campbell [having such notice of the premises as aforesaid] accepted the same in full discharge and satisfaction of the same, and of all liability of the defendants for and in respect of the said bark and of the said expenses, and of the agreement in the declaration mentioned; and that the said payment was made by two cheques or orders on certain bankers for payment of the said amount, payable to the said Sir James Campbell or order, of all which premises the plaintiff had notice before the commencement of this action. The plea then alleged that the goods bargained and sold in the second count of the declaration mentioned were the bark sold as aforesaid upon the terms and under the circumstances aforesaid, and paid for as aforesaid, and that the accounts in the said third count mentioned were stated of and concerning the said bark so bought and paid for as aforesaid, and not otherwise.

Issue on the pleas.

Demurrer to the sixth plea, and joinder therein.

The issues of fact came on for trial, before *Byles*, J., at the

(*a*) After argument upon demurrer, the plea was amended by inserting the parts within brackets: *post*, p. 236.

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Gloucester Summer Assizes, 1860, when the plaintiff proved a written agreement between him and the defendant, in the terms stated in the declaration. The defendant's counsel was about to cross-examine him for the purpose of shewing that it was never intended that the agreement should operate as a contract between the plaintiff and the defendant, when the plaintiff's counsel objected that evidence was inadmissible to contradict the written agreement. The learned Judge (after consulting *Hill, J.*) ruled that parol evidence could not be received in equity any more than in law to contradict a contemporaneous written contract, and under his lordship's direction a verdict was entered for the plaintiff.

In the following Term a rule was obtained for a new trial on the ground of the improper rejection of the evidence ; against which

*Phipson* (*Pigott*, Serjt., and *J. J. Powell* with him) shewed cause, and also argued in support of the demurrer (*a*).—The question raised at the trial is substantially the same as that raised by the demurrer to the sixth plea. That plea is bad, because it seeks to vary the contract set out in the declaration by alleging another and a different contract not in writing. The contract declared on is definite and precise as to the amount per ton to be paid for the bark, and also as to the time of payment ; but the plea alleges a contract to pay a less amount per ton, including the expense of carting and ricking. It contains no allegation of fraud or misrepresentation on the part of the plaintiff. The gist of the plea is the alleged contemporaneous parol agreement, and at law it is clear that, in the absence of fraud, such an agreement is inadmissible to contradict a written contract. Then is there a different rule in equity ? In *Sugden's Vendors*

(*a*) January 30, 1861. Before *Pollock, C. B., Martin, B., Bramwell, B., Channell, B., and Wilde, B.*; and April 22, 1861, before *Pollock, C. B., Martin, B., Bramwell, B., and Wilde, B.*

and *Purchasers*, p. 159, 14th ed., it is said:—"The rules of evidence are universally the same in Courts of law and equity. Parol evidence, which goes substantially to alter a written agreement, cannot be received in a Court of equity any more than in a Court of law. Therefore the plaintiff cannot shew that it was agreed by parol that part of the estate should not be conveyed. Neither can it be proved by parol evidence that an agreement to sell to two jointly was really a contract with one only, and the other was to have a security for the money he might advance, for that would contradict the written agreement." The learned author then proceeds to notice the cases in which a Court of equity will interfere; and at page 160 says that, although equity cannot enforce an agreement with a parol variation on the ground of mistake or surprise, "yet when it is called upon to exercise its peculiar jurisdiction by decreeing a specific performance, *the party to be charged* is to be let in to shew that, under the circumstances, the plaintiff is not entitled to have the agreement specifically performed. Collateral circumstances may be proved by parol as a defence; for example, duress at law, fraud and circumvention in equity; for although this affects the agreement it does not vary it." [*Channell, B.*—In *Pooley v. Harradine* (a) it was assumed that the rule was the same at law and in equity; and the plea did not set up a contract between the creditor and the surety different from that apparent on the written contract, but disclosed an equity arising from the relationship of principal and surety inter se, known to the creditor.] The distinction between the admission of parol evidence to support, or resist, the specific performance of a contract is pointed out by Sir T. Plumer, M.R., in *Clowes v. Higginson* (b). In *Croome v. Lediard* (c), Sir John Leach,

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(a) 7 E. & B. 431.

(b) 1 Ves. & B. 524. 526.

(c) 2 Myl. & K. 251

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V.C., held that, although parol evidence of matter collateral to the contract might be received, evidence of matter dehors was inadmissible to alter the terms and substance of the contract. *Myers v. Watson* (a) and *Martin v. Pycroft* (b) are also authorities that where there is no fraud or mistake, a written agreement is binding in equity as well as at law, although accompanied by some additional provision verbally agreed to. [*Bramwell*, B.—Is not the plaintiff in this dilemma? If a writing is necessary to make the plea good, must it not be read as alleging an agreement in writing. If a writing is not necessary, the learned Judge was wrong in stopping the case, for the plea might have been proved. Therefore the plaintiff cannot succeed both on the rule and the demurrer.] If the plea be construed as alleging an agreement in writing it is incapable of proof. If it alleges a parol agreement evidence was not admissible in support of it. [*Bramwell*, B.—Is not the essence of the plea this? The defendants say:—"Neither you nor I know what will be the expense of carting and ricking the bark in the present year, but we know the price paid for bark last year, and to that we will add the expense of carting and ricking whatever it may be." Then the defendants afterwards discovered that the expenses added to the price of the bark amounted to less than 6*l.* per ton, that is to say, 5*l.* 2*s.* per ton, which they paid the plaintiff.]—The plea is also bad on another ground. The first count of the declaration alleges that the defendant had the benefit and possession of the bark; and the plea is pleaded not only to that count but to the count for goods bargained and sold. But if the defendant has kept the goods, the plea is no answer to the latter count.

Macnamara (*Huddleston* and *Bathurst* with him), in support of the plea and the rule.—The plea affords a good

(a) 1 Sim., N. S. 523. 529.

(b) 2 De Gex, M. & G. 785.

equitable defence to the action. It in effect states, that the plaintiff had a limited authority, as agent, to sell the bark for his principal at the price paid in the preceding year for bark of the same kind, with the addition of the expense of carting and ricking the bark in the present year: that the defendants afterwards ascertained that such price, together with the expenses, amounted to a sum less than that claimed by the plaintiff, and which the defendants paid to the principal in satisfaction and discharge of the agreement mentioned in the declaration. [*Wilde*, B.—In order to set up a payment to the principal, ought not the plea to have alleged that he had notice of what his agent did?] That must be assumed. In *Fitzherbert v. Mather* (a), *Ashurst*, J., said:—"On general principles of policy the act of the agent ought to bind the principal, because it must be taken for granted that the principal knows whatever the agent knows." There was, therefore, constructive notice to the principal: *Hiern v. Mill* (b). After the intervention of his principal, the right of the plaintiff to sue was gone: *Coppin v. Walker* (c); *Sadler v. Leigh* (d). [*Martin*, B.—Can the payment of a smaller sum operate as a satisfaction of a greater when paid to the principal any more than it does when paid to the agent?] The doctrine laid down in *Cumber v. Wane* (e) does not apply, for the amount paid to the principal was all that the agent was authorized to receive; and whether paid or not, the intervention of the principal put an end to the agent's authority. [*Martin*, B.—That argument would tend to shew that the contract declared on was rescinded, but the plea does not amount to that.] It is not pleaded as a rescission of the contract, but as a disaffirmance by a principal of a contract made by his agent in excess of

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(a) 1 T. R. 12.

(d) 4 Camp. 195.

(b) 13 Ves. 120.

(e) 1 Str. 426; 1 Smith's Lead.

(c) 7 Taunt. 237.

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authority. [*Wilde*, B.—Then ought it not to shew that the principal had knowledge of the contract? No doubt, for certain purposes, knowledge by the principal is presumed, but does that apply to a case of this kind?] As against the agent, it must be presumed that the contract made by him was known to his principal; but if not, the absence of knowledge should have been replied. In equity parol evidence is admissible to shew that a written agreement does not contain the real contract between the parties. In *Clarke v. Grant* (a), the Court refused to decree specific performance of a written agreement which was varied by a contemporaneous parol agreement. Sir *W. Grant*, M. R., there said:—"It would be against equity, and a fraud on the defendant, to insist upon his performance of an agreement, which he only signed on the faith of an alteration being made in one of its terms. It has been ruled, that it is not open to a plaintiff to supply or correct a term of a written agreement by parol; but it has never been determined that a defendant cannot set up a parol engagement in opposition to a party, who, having entered into it seeks to have a written agreement specifically performed independently of it." In Sugden's Vend. and Purch. p. 161, 14th ed., it is said:—"It is not necessary, in order to render the evidence admissible, that its object should be to shew fraud, mistake, or surprise, collateral to or independent of the written contract, although that usually is its tendency; but the evidence is admissible where, by way of defence, the object is to get rid of the contract by shewing that it is not the contract really entered into by the parties, although where, even as a defence, the evidence is used to shew that the terms of the contract are not the real ones, the evidence, when admitted, must be very powerful to induce the Court to believe that the terms expressed are not the real ones."

(a) 14 Ves. 519. 524.

Pooley v. Harradine (a) is an authority that although a written contract cannot be varied by parol, evidence is admissible to shew that it would be inequitable to enforce it. That decision was recognised and adopted by this Court in *Taylor v. Burgess* (b), and approved of by the Exchequer Chamber in *Greenough v. M'Clelland* (c). In *Wood v. Dicarris* (d) a replication was held good which stated facts shewing that the defence was inequitable (e). There are also numerous authorities in equity which support the proposition contended for: *Raeburn v. Wickham* (f); *Lincoln v. Wright* (g); *Davis v. Symonds* (h); *Winch v. Winchester* (i); *Buxton v. Lister* (k); *The Marquis of Townsend v. Stangroom* (l); *Pember v. Mathers* (m).

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Phipson replied.

POLLOCK, C. B.—We are all of opinion that there ought to be a new trial.

We are also of opinion that the defendants are entitled to judgment on the demurrer, if the plea can be read as disclosing that the principal had knowledge of the terms of the contract made by the plaintiff, his agent, with the defendant. Upon that point my brother *Martin* is not satisfied. I think, however, that it must be assumed that the principal and agent were in communication with each other; and that after the principal intervened and accepted the money paid to him in satisfaction of his claim, the agent has no right to say that his principal had no know-

(a) 7 E. & B. 431.

(b) 5 H. & N. 1.

(c) 2 E. & E. 429.

(d) 11 Exch. 493.

(e) See Preface to 11 Hare,
pp. xviii. xix.

(f) 3 De Gex & J. 304.

(g) 4 De Gex & J. 16.

(h) 1 Cox Ch. Cas. 402.

(i) 1 Ves. & B. 375.

(k) 3 Atk. 383.

(l) 6 Ves. 328.

(m) 1 Bro. C. C. 52.

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ledge of the contract ; and even if he had not, it seems to me that the want of notice ought to be replied.

MARTIN, B.—In my opinion the plea is defective. There is nothing on the face of it to shew that, at the time the money was paid to the principal, he had any knowledge of the contract alleged in the plea to have been made by his agent ; and there could be no satisfaction of that contract unless he knew of it.

BRAMWELL, B.—Although I am disposed to think the plea good as it stands, I express that opinion with some hesitation.

WILDE, B.—The safest course will be to amend.

Rule absolute for a new trial ; with
liberty to amend the plea.

The plea was subsequently amended by inserting the words within brackets, *ante*, p. 229.

The issues were then tried, before *Hill*, J., at the Gloucester Summer Assizes, 1861, when a verdict was entered for the plaintiff for the damages in the declaration subject to a special case, to be stated by an arbitrator, which was subsequently stated (so far as material) as follows :—

1. The evidence was very conflicting on several material points, which has occasioned great difficulty in coming to a conclusion, but I find the following facts.

2. The plaintiff was a bark and timber dealer and commission agent at Lydney in Gloucestershire, and the defendants carried on business as millers and cornfactors in the city of Gloucester, and occasionally purchased timber and bark.

3. In the early part of 1857, Sir James Campbell, Bart., was deputy surveyor of the forest of Dean, in the county of Gloucester, and as such had a quantity of bark in various parts of the forest not harvested or stacked, amounting to about 930 tons, for sale on behalf of the Crown.

4. About the month of May, 1857, the plaintiff was authorized by Sir James Campbell to dispose of the bark, as agent for the Crown, selling it at the then last year's prices of bark, adding the expenses of harvesting and stacking the bark, and receiving from the Crown 5 per cent. on the price as a commission for selling. Afterwards, and before the 21st of July, 1857, by verbal arrangement between Sir James Campbell and the plaintiff, the plaintiff became the purchaser of the bark on his own account at the last year's prices: the harvesting and stacking of the bark to be at the plaintiff's expense, and the plaintiff to be allowed a discount on the price, if paid in ready money, and the price to be wholly paid before removal of the bark by the plaintiff. The plaintiff expected also, though it was not proved to be part of the contract, that he should be allowed under the name of discount, and in addition to the discount for ready money, a sum equal to the commission to which he would have been entitled if he had sold as agent. The plaintiff took possession of the bark, and it was harvested and stacked before the 21st of July, 1857.

5. On the 21st July, 1857, the plaintiff, after previous communications with the defendants on the subject of the bark, represented to them that he was employed by Sir James Campbell to sell the bark on behalf of the Crown, at the last year's prices, adding the expenses of carting and ricking the bark, and that he did not then know the amount of such expenses, but that they would not together with the said prices exceed 5*l.* 5*s.* per ton, and that Sir James Camp-

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bell would send the defendants a correct invoice of the bark with the amount of such prices and expenses. The plaintiff offered the bark to the defendants on those terms, and requested them to sign a bought note stating the nominal price at 6*l.* per ton with a discount of not less than 2*l.* per cent., and stated to the defendants that they should not be called upon to pay more than the actual amount of such prices and expenses, and that they would not be incurring any risk by signing such note, as they were dealing with the Crown and not with a private individual.

6. The defendants thereupon, and on the faith of such representations and statements, and in pursuance of the said request, agreed to buy the bark from the plaintiff as agent of the Crown on the said terms, and signed a bought note of which the following is a copy:—

“ Gloucester, July 21st, 1857.

“ Bought of Mr. Rogers the entire of the bark harvested in good merchantable condition, now ricked in Dean Forest, as and where it now stands, at 6*l.* per ton, forest weight of 20 cwt. per ton: 20 per cent. deposit to be paid in cash on Saturday, July 25/57, and the remaining cash (purchase money) to be paid within fourteen days from that date. We to be allowed a discount of not less than 2 per cent. on the purchase money.”

(The note then described the situation of the bark ricks.)

(Signed) “J. & J. Hadley.”

The plaintiff at the same time signed a sale note in corresponding terms.

The plaintiffs at the same interview requested the defendants to pay the deposit into the bank at Newnham in Gloucestershire to the credit of Sir James Campbell.

7. A few days after the plaintiff sent to the defendants an invoice of the bark, of which the following is a copy:—

Lydney, 1857.

Messrs. J. & J. Hadley.

To William Rogers, Dr.

July 21.

Tons Cwts.

To 930 13 forest bark.

Crown weight at 120, 3583 18 0

Payment.

July 25.—Deposit . £1116 15 6.

Aug. 3.—Balance in cash.

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And by the letter enclosing such invoice the plaintiff informed the defendants that he was about to go to Denmark, and again requested them to pay the deposit upon the bark to the account of Sir James Campbell at the bankers of the latter at Newnham.

9. The defendants accordingly, on the 25th of July, sent to the said bank their cheque, payable to Sir James Campbell or order, for 1094*l.* 11*s.* 1*d.*, being the amount of the deposit, less 2 per cent. upon the deposit, and they informed the plaintiff thereof by the following letter:—

“ William Rogers, Esquire,

“ Lydney. “ City Flour Mills, Gloucester,

“ Dear Sir.

“ July, 25/57.

“ We are sorry that we are unable to attend to your request of yesterday in consequence of being from home, but we have by this post in conformity with your wish and direction sent our cheque (value 1094*l.* 11*s.* 1*d.*) amount of deposit at 20 per cent., payable to Sir James Campbell, Bart., or order, at the Gloucestershire Banking Company, Newnham. Please see that we have acknowledgment and receipt for the same.

“ Dear Sir, yours truly,

“ J. & J. Hadley.”

“ We have deducted discount 2 per cent. from the full amount.”

9. On the 3rd of August, 1857, the defendant Joseph Leonard Hadley met Sir James Campbell by appointment.

10. Between the 21st of July and the 3rd of August

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communications had passed between the plaintiff and the defendants in which the plaintiff had treated the sale of the bark as a sale made by him as a principal and at the actual price of 6*l*. per ton. And at the said meeting on the 3rd of August between the defendant, Joseph Leonard Hadley, and Sir James Campbell, the said defendant told Sir James Campbell that the sale was made by the plaintiff as agent for the Crown, and that the price inserted in the bought and sold notes was a nominal price only, and that by the real arrangement the defendants were to pay only the last year's prices and the expenses of carting and ricking.

11. At the said meeting and before the payment hereinafter mentioned Sir James Campbell informed the said defendant that the price of the bark at the last year's prices was 4270*l*. 12*s*. 10*d*., and that the expenses of carting and ricking the said bark were 490*l*. 14*s*. 5*d*., and handed to him a memorandum shewing the said amounts, of which memorandum and the receipt by Sir James Campbell, hereinafter mentioned, the following is a copy:—

DEAN FOREST.

	Tons.	Cwt.	Qrs.		£	s.	d.
Sea Bailey .	95	8	0 . .	@ 91/8 .	437	5	0
Other parts .	199	17	0 . .	85/ .	847	17	6
Coppice bark	373	6	0 . .	94/2 .	1752	18	3

HIGHMEADOW WOODS.

Timber bark .	187	15	2 . .	93/ .	873	3	0
Coppice . .	75	13	3 . .	95/ .	359	9	1
	930	17	0		£4270	12	10

Deposit .

£ s. d.
 4270 12 10

490 14 5

4781 17 3

27th July,
 1857.

1094 11 1 by Newnham Bank.

Aug. 3rd. £3686 16 2 ditto being balance due to me for bark fall of 1857.

Ja. Campbell.

Expences .

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12. The defendant, Joseph Leonard Hadley, afterwards at the said meeting on the 3rd of August, or at a subsequent meeting between them on the same day, paid to Sir James Campbell by cheque of the defendants, payable to order, the sum of 3666*l.* 16*s.* 2*d.*, making with the sum previously paid 4761*l.* 17*s.* 3*d.* Sir James Campbell thereupon wrote and signed the acknowledgment appearing on the said memorandum of the payments of the said two sums.

13. The said sum of 490*l.* 14*s.* 5*d.* was, in fact, the whole amount of expenses of carting and ricking paid by Sir James Campbell, and the defendants, at the time of the said payments by the said Joseph Leonard Hadley, had not been informed of the further expenses to the amount of 22*l.* 10*s.*, 10*s.* and 12*s.* 7*d.* hereinafter mentioned, and at the said time the defendant Joseph Leonard Hadley believed in consequence of the information received by him as aforesaid from Sir James Campbell at the said meeting, that the said sum included all expenses of carting and ricking, and that the defendants would have nothing more to pay for the bark or expenses.

14. There were, in fact, some other expenses of carting and ricking not included in the said sum of 490*l.* 14*s.* 5*d.*, namely, 22*l.* 10*s.*, 10*s.* and 12*s.* 7*d.*, being respectively expenses which the plaintiff was liable to bear under the said arrangement between himself and Sir James Campbell. The 22*l.* 10*s.* was for hire of tarpaulings, and was paid by the plaintiff after the said 3rd of August, nor did the plaintiff or Sir James Campbell on the 3rd of August know the amount payable for the same. The other two small sums for hauling and carriage of the tarpaulings, were paid by the plaintiff to the haulier and carrier before the said 3rd of August. It did not appear that they had ever come to the knowledge of Sir James Campbell. No part of the said three sums of 22*l.* 10*s.*, 10*s.* and 12*s.* 7*d.* has been repaid to the plaintiff.

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15. The defendants after the said 3rd of August, 1857, took possession of the said bark, and removed it from the forest.

16. The plaintiff still contending that he actually sold as a principal, and that the price inserted in the bought and sold notes was the price actually agreed and intended to be paid, commenced this action for the recovery of 822*l.* 10*s.* 9*d.* as the difference between the amount of the 4761*l.* 7*s.* 3*d.* paid by the defendants and the price of the bark according to the bought and sold notes.

17. It was proved before me on behalf of the defendants, that, after the commencement of this action, interrogatories were administered in the action by the defendants to the plaintiff, in answer to one of which, the plaintiff stated that he did not claim anything for the expenses of carting and ricking, but that he claimed 822*l.* 10*s.* 9*d.* as the difference as aforesaid. The plaintiff did not in the answer to the said interrogatories, allege that he had not been paid expenses not included in the said 490*l.* 14*s.* 5*d.*

18. It has been arranged between the parties that the statement of this case is to be without prejudice to the right of the plaintiff to contend that oral evidence is not admissible to vary the terms or effect of the bought and sold notes on the 21st of July, 1857, and if the Court shall be of that opinion, the statement in this case of what passed on the occasion when the notes were signed, is, so far as the same shall be held inadmissible, to be considered as struck out of the case.

19. It has also been agreed that the statement of this case is to be without prejudice to the right of the defendants to contend that the weight of the bark delivered to them was less than 930 tons 13 cwt., the quantity on which the plaintiff's claim is calculated, and that if, in the opinion of the Court, it be material for any purpose to ascertain the

actual weight, the same shall be ascertained (in default of agreement between the parties) by further inquiry before me.

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The question for the opinion of the Court is, whether the plaintiff is entitled to recover?

Pigott, Serjt. (*J. J. Powell* with him), argued for the plaintiff (June 3, 4).—First, the contract was contained in the bought note, and parol evidence was inadmissible to vary it. Secondly, there was no misrepresentation or fraud on the part of the plaintiff which precludes him from recovering. The invoice gave the defendants notice, before their position was altered by payment of the deposit, that the plaintiff was the principal, and that he was seeking to enforce the written contract. The defendants elected, notwithstanding, to take to the subject-matter of the sale. Under these circumstances, the plaintiff's misrepresentation will not deprive him of his rights under the contract: *Rayner v. Grote* (a). Again, unless the contract itself was based on fraud, the defendants had no election to avoid it. From the facts found by the arbitrator, no such fraud can be inferred. To sue upon a contract against good faith is no fraud at law. An equity may possibly exist to have the contract reformed. It is here attempted, as in *Greaves v. Ashlin* (b), to vary a written contract by parol evidence. In *Wake v. Harrop* (c), *Bramwell*, B., threw out a suggestion, which is adverse to the plaintiff, but the decision in that case proceeded upon the ground that there was a good equitable defence to the action. [*Bramwell*, B.—The effect of my suggestion was, that the parties might shew they did not intend the written instrument to contain the terms of an agreement between them. If, by mistake, the attesting witness to an

(a) 15 M. & W. 359.

(b) 3 Camp. 425.

(c) 6 H. & N. 768; in error, 1 H. & C. 202.

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agreement signed the agreement, and one of the contracting parties signed in the place intended for the witness, could it be contended that the attesting witness was bound by the agreement?] In such a case there is an obvious mistake. Here, the defendants do not contend that there was no contract between the parties. They seek to substitute for the precise terms of a written contract certain parol matter, as to which the arbitrator has stated that there was most conflicting evidence. If the defendants' contention be correct, a price was fixed by the bought and sold notes without any object. The plaintiff must, at all events, recover the expenses which the defendants admit to be unpaid.—He also referred to *Bickerton v. Burrell* (a) and *Mallalieu v. Hodgson* (b).

Macnamara, for the defendants.—The plaintiff's main contention is, that his fraud has been waived by the defendants' conduct. The rule on this subject to be deduced from the authorities is, that where a person has been induced to enter into a contract by a fraudulent misrepresentation, and afterwards with knowledge of the fraud does any act by which he evinces an intention to adopt the contract to which the fraud has conduced, that he cannot after that repudiate the contract. That rule has no application here. There were two contracts in this case. A real contract by parol, a nominal contract in writing. [*Pollock*, C. B.—In strictness there is but one contract. For some purpose—probably to comply with some official requisition—it is stipulated that there should be a written document. *Wilde*, B.—The written document does not exclude the parol contract, unless it is found by the arbitrator that the written document was intended to contain the terms of the contract.] The arbitrator's finding negatives such a view. The defend-

(a) 5 M. & Sel. 383.

(b) 16 Q. B. 689.

ants have acted throughout in strict pursuance of their verbal contract with the plaintiff, who was acting, as he represented, as Sir James Campbell's agent. The nominal contract in writing cannot be affirmed by conduct which clearly had reference to the verbal contract. [*Bramwell*, B.—Suppose that Sir James Campbell had had no interest of any kind in the thing sold?] The plaintiff would be estopped by his representations from denying that he entered into the contract as Sir James Campbell's agent. A false representation, upon the faith of which the defendants alter their position, is as binding as if the facts represented were true. *Pickard v. Sears* (a) and notes to the *Duchess of Kingston's Case* (b).

The defendant's position was altered by payment of the deposit, before they had notice, that the plaintiff was seeking to enforce the nominal contract. No such notice was conveyed by the invoice, which was merely a calculation of the price on the basis of the bought and sold notes, the real price not being then ascertained. The object of inserting the price of 6*l.* per ton in the bought and sold notes was, that it might cover the real price, which could not then be ascertained, and stand as a security for its payment. The cases cited by the other side, to shew that the fraud has been waived, are distinguishable on the ground that the conduct relied on, as a waiver of the fraud, had reference to a different transaction. Upon the argument of the demurrer in this case, the Court were unanimously of opinion that if, at the time of the settlement with Sir James Campbell, Sir James Campbell knew of the whole transaction between the plaintiff and the defendants, no action lay for the difference in price: *Rogers v. Hadley* (c). That fact is now found by the special case. The pleas of non assumpsit

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(a) 6 A. & E. 469.

(b) Smith's Lead. Cas. 722.

(c) *Ante*, p. 235.

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and fraud are an answer to the first count ; the plea of payment, and the equitable plea to the whole declaration. The facts stated in the case shew a fraud in equity, if not at law. The equitable plea may, however, be supported as a good plea at law : *Vorley v. Barrett* (a). Lastly, the claim for expenses is not maintainable. The plaintiff has sworn in answer to interrogatories that he is not suing for them. They form no part of the price, and should have been sued for, if at all, in a separate count. But after a settlement with the principal without notice of any claim by the agent the agent cannot sue : *Coppin v. Walker* (b). An unauthorized agent cannot be sued on a contract which he has assumed to make merely as agent : *Lewis v. Nicholson* (c). The converse proposition must also hold.

Pigott, Serjt., in reply.—The estoppel must fail. The defendants received the invoice before their position was altered. The invoice computes the sum to be paid as a deposit by the price per ton in the bought and sold notes. This was notice that the plaintiff was not treating that price as merely nominal. [*Wilde*, B.—The real price per ton was not then ascertained: Without some ascertained price, the amount of the deposit could not be calculated.] After full notice the defendants have paid Sir James Campbell. [*Channell*, B.—How does that affirm the plaintiff's claim?] The defendants have taken the bark. [*Channell*, B.—But on the terms of paying Sir James Campbell.] They were not entitled to do so after notice. The act is therefore an affirmation of the written contract.—As to the equitable plea. The averment that “the plaintiff was employed to sell the bark as agent for Sir James Campbell” is disproved. [*Channell*, B.—Would it not be sufficient to aver, that the

(a) 1 C. B., N. S. 225.

(b) 7 Taunt. 237.

(c) 18 Q. B. 503.

plaintiff *represented* he was so employed?] Not if there be no estoppel. No case has carried the doctrine of estoppel to the extent to which it is now sought to carry it.—The expenses at least, are recoverable. [*Channell, B.*—Not until they have been ascertained by Sir James Campbell.]

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POLLOCK, C. B.—We are all of opinion that the defendants are entitled to judgment. The law is opposed to fraud, and will not allow the course of justice to be impeded by rules of a technical character, when fraud is established. There is no more stringent maxim, than that no one shall be permitted to aver against a record; but, where fraud can be shewn, this maxim does not apply.

The rule which applies to a case simply of fraud, that is, where a person has *by fraud been induced* to contract, is, that he may elect whether he will adopt the contract or repudiate it. If, with notice of the fraud, he adopts the contract, he cannot afterwards repudiate it. But this doctrine, which is undoubtedly sanctioned by authority, does not, in my opinion, apply to the facts of this case.

In the course of the argument it was pointed out by my brother *Wilde* that this is not an attempt to alter a written contract by parol evidence. There was, in fact, only one contract between the parties; but, as the exact price could not be ascertained until the account was made up, the defendants were requested by the plaintiff to sign a paper—not as evidence of the contract between the parties, but to serve some merely apparent purpose—probably, to comply with some official requisition that such a document should be filled up. The finding of the arbitrator is express, that the object was to obtain a document, not to record a contract. There was, therefore, a real contract not in writing, and a paper prepared in order to comply with some form, which was stated at the time to contain a merely nominal

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price. If this were a fraud on the plaintiff's part, the authorities shew that evidence of the fraud is as admissible as evidence of duress, illegality, or mistake. My brother *Bramwell* during the argument put the case of the attesting witness to an agreement signing the agreement, and the contracting party signing in the place intended for the attesting witness, by mutual mistake. Such a mistake might undoubtedly be explained by parol evidence.

It was next contended, that the deposit was paid by the defendants with knowledge of the plaintiff's claim. For this purpose the invoice was relied on. But the invoice gave no more information to the defendants than would have been conveyed by the production of the original document. There was nothing in the invoice to arouse the defendants' suspicions that they were to be dealt with as if the real price was 6*l.* per ton, or the plaintiff the real seller. But subsequently to the payment of the deposit, the plaintiff treated the sale of the bark as a sale by himself as principal, at the price of 6*l.* per ton. On this the defendants' suspicions are aroused, and they communicate the whole affair to Sir James Campbell. Sir James Campbell then delivers the bark to them, as a delivery from himself, receives the purchase money, and gives a receipt in his own name. The plaintiff then brings his action. The defence set up is, that the defendants made no such bargain with the plaintiff as is stated in the declaration. The arbitrator has found this to be true. There is also a plea of payment, and the defendants have, in fact, paid all that was due under their real contract with the plaintiff. Then there is an equitable plea. I think that of that plea so much was proved as was necessary to constitute a defence to the action. The plea would, as my brother *Channell* suggested, have been equally good, if it had averred that the plaintiff *represented* that he was Sir James Campbell's agent, not that he actually was so.

Lastly, a claim is made for certain expenses. The answer is, that the plaintiff having sworn he was not suing for expenses, cannot now claim them in this action. But at all events the claim could not be maintained until Sir James Campbell had ascertained what the amount of these expenses was, and it is clear he had not ascertained it before this action was commenced.

On these grounds the defendants are, in my opinion, entitled to judgment.

BRAMWELL, B.—I am of the same opinion. Where the parties to an agreement have professed to set down their agreement in writing, they cannot add to it, or subtract from it, or vary it in any way by parol evidence; otherwise they would defeat that which was their primary intention in committing it to writing. But where, at the time when a document, which is apparently an agreement, was signed, the parties expressly stated, that they did not intend it to be the record of any agreement between them, though this is a conclusion of fact which a jury should adopt with extreme reluctance, the parties would not in such a case be bound by the document. Whether the signature is, or is not, the result of a mistake is immaterial. The reasoning proceeds on this ground, that the parties never intended that the document should contain the terms of an agreement between them. And this view is supported by authority. The cases where deeds have been delivered as escrows illustrate the principle. In the case of *Pym v. Campbell* (a) a document on its face purported to be a perfect and complete agreement, signed by the parties, but it was clearly proved, that the intention of the parties who signed was, that it should not operate as an agreement, unless A. approved; A. did not approve, and the Court of Queen's Bench were of opinion that the docu-

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(a) 6 E. & B. 370.

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ment was not the record of any agreement between the parties. The only doubt which I entertain is, whether that reasoning applies to the facts of this case; for the parties must undoubtedly have signed this paper for some purpose, and there is no statement in the case that it was signed for any official purpose. The finding is, however, express that the real agreement between the parties was a different one. Upon the facts stated, I incline to the opinion that the written paper is not binding on the parties, inasmuch as it is not the memorandum of any agreement between them.

Secondly, assuming this defence is not available, the defendants are, at all events, entitled to rely on the representation made by the plaintiff that he was acting as Sir James Campbell's agent. If that representation had been true, Sir James Campbell would have had a right to intervene as principal, and settle with the defendants on such terms as he and they might arrange. But Sir James Campbell was not, in fact, the real principal. In this view of the case, the defendants can only avail themselves of the representation as an estoppel. It is said, however, that because the truth was told to the defendants before they took the bark, there is no estoppel. It is argued, that they might have avoided the contract, received back their deposit, and maintained an action for the wrongful or fraudulent statement; but that, having elected to take the bark, they must pay the plaintiff for it. The answer is, that the deposit had already been paid on the faith of the plaintiff's representations, and that no offer was ever made to return it. The defendants would thus be compelled either to maintain a cross action to recover the deposit, or to take the goods which they had been induced to purchase by an untrue representation, I purposely do not say by a "fraud," and pay upon the terms imposed by the

the owner. The plaintiff's argument on this point would apply equally, if no written document existed. Suppose the plaintiff had, upon the representation that he was Sir James Campbell's agent, verbally sold goods to the defendants for 5000*l.*, could he, after the defendants had been told, have informed them that the goods were his own and the price 6000*l.*; that they now knew the real facts and had no right to the goods except upon his terms? Suppose again, that a man were to represent that he had authority to sell as agent upon the terms of setting off half the purchase money against a debt due from his assumed principal to the purchaser, and on the faith of this representation, that half the purchase money were paid down, would the purchaser, on learning that the assumed agent was the real principal, be forced either to pay the entire price, or to maintain a cross action to recover what he had paid? The conclusion at which I arrive is, that the defendants, having acted on the faith of the plaintiff's representations, were entitled to settle with Sir James Campbell, and consequently that the plaintiff has no claim.

The defendants have also another defence. It is clear to my mind, from the statements in the case, that the goods were actually delivered to the defendants, not by the plaintiff, but by Sir James Campbell. The contract by which Sir James Campbell sold the bark to the plaintiff was verbal: there was neither a payment nor a part delivery. There is, therefore, nothing to shew that it was not competent for Sir James Campbell to repudiate that arrangement, and deliver the bark to the defendants. If that be the case, there has been no delivery to the defendants by the plaintiff. It may be doubtful however, how far this would be an available answer to the first count without a plea denying the readiness and willingness to deliver. But, on the authority of

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Lamond v. Davall (a), it would be an answer to the count for goods bargained and sold, since an action on that count was there held not to be maintainable, where the delivery of the goods was taken out of the plaintiff's power by reason of a subsequent sale. But whatever may be the value of this point, upon the first and second grounds, which I have stated, I think the defendant is entitled to judgment.

CHANNELL, B.—After some doubt in the course of the argument, I have come to the conclusion that the defendants are entitled to judgment; but I am not free from a doubt as to the particular issue on which the judgment ought to be entered, whether upon the issue raised by the first plea. I quite agree that where the parties to an agreement sign, or otherwise adopt a written instrument, which they mean and understand to be the terms of the agreement between them, they cannot alter those terms by parol evidence. On the other hand, parol evidence is always admissible for the purpose of invalidating the agreement altogether on the ground of fraud. But the facts stated in the fifth and sixth paragraphs of this case appear to me to warrant the view that, although the bought and sold notes were respectively signed by the parties, both parties understood that the bought and sold notes were not in reality intended to constitute any contract. I agree with my brother *Bramwell*, that a Judge should be most careful to caution a jury against arriving at such a conclusion hastily; but I can see no reason why such a conclusion should not be adopted, though a document has been signed which on its face purports to be a contract, if both parties understood that the document was not a contract, and the rights of third parties have not intervened.

On the facts here stated, I am of opinion that there

(a) 9 Q. B. 1030.

was no such agreement between the plaintiff and defendants as that declared on in the first count. My brother *Bramwell*, upon the supposition that this view may not be correct, has proceeded to consider how far the plaintiff would be entitled to recover, on the ground that the parties may have meant this document to be an agreement, and that the defendants are estopped from setting up what both parties understood to be its meaning. I am of opinion that, if the bought and sold notes did contain an agreement which was meant to bind the parties, there was such fraud in the representations by which the defendants were induced to sign the bought note as would prevent them from being liable on this document. Upon this branch of the case the general principle is not disputed on the part of the plaintiff. But the answer relied on is, that although there may have been such fraud on the part of the plaintiff as would have entitled the defendants, if they had remained quiescent, to treat this contract as annulled, they have to a certain extent acted upon it, and have, by so acting, estopped themselves from setting up its invalidity. On full consideration I am of opinion that this argument ought not to prevail. The declaration is framed upon the contract disclosed by the bought and sold notes. The invoice delivered on the 24th of July does not in terms give any notice to the defendants which differs from that which the bought and sold notes conveyed, with the exception that it estimates the quantity of bark, which was previously undefined, for the purpose, as I conceive, of ascertaining the amount of deposit to be paid. The invoice no doubt debits the defendants as the buyers, and as debtors to the plaintiff; but the plaintiff's case is not carried further by the heading of the invoice than by the language of the bought and sold notes. I think that prior to the 3rd of

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August nothing took place which can be relied on as notice to the defendants, that the plaintiff was setting up the contract on which he has declared. On the 3rd of August a statement is made to Sir James Campbell by one of the defendants disclosing the real nature of the transaction, from which it appears that the defendants then had notice that the plaintiff had assumed to be treated as the principal in the transaction. Undoubtedly, as against the defendants, this statement would be evidence that they then had the knowledge, without which they could not have made this communication. But the deposit had previously been paid; and therefore it would seem that no argument as to the adoption of the contract can be founded on that payment.

There is also another circumstance relating to the payment of the deposit, which is not immaterial, as shewing that it in fact only carried out the original arrangement between the parties. For although this payment was made on the 25th of July in pursuance of the plaintiff's letter of the 24th, yet at the very outset of the transaction, when the verbal arrangement was made on the faith of which the defendants signed the bought note, the plaintiff requested them to pay the deposit into the bank to the credit of Sir James Campbell. And in the letter of the 24th of July the plaintiff *again* repeats the same request. The payment therefore, though made in pursuance of this letter, did no more than carry out the suggestion made at the original interview.

The only remaining fact which is relied on as an adoption of the contract is, that the defendants have had the bark, and have paid Sir James Campbell for it. Independently of the point suggested by my brother *Bramwell*, that the plaintiff has not delivered the bark himself, it appears to me that the defendants have obtained it, not as

from the plaintiff but as from Sir James Campbell, whom they were entitled to treat as the rightful seller. Under these circumstances, I am unable to see either in the receipt of the bark, or in the payment to Sir James Campbell, any adoption of that contract on which the plaintiff has declared.

The next question is, whether the plaintiff can recover the claim of 23*l.* 12*s.* 7*d.* expenses, which it is argued he may do upon the count for goods bargained and sold. To that argument I cannot accede. The contract made by the defendants was to pay a sum made up by taking a given price per ton and adding certain expenses when ascertained. The expenses would, in my opinion, if properly ascertained, form part of the price. But the mode by which these expenses were to be ascertained was by an account to be sent by Sir James Campbell to the defendants, which had not been done when this action was commenced. Consequently these expenses were not then ascertained as part of the price so as to constitute a debt in respect of which the plaintiff could sue.

For these reasons I am of opinion that the defendants are entitled to judgment, though not without some doubt as to the particular issues on which the judgment ought to be entered.

WILDE, B.—I am of the same opinion. I have arrived after some doubt at a conclusion, which to my mind is satisfactory, upon two short grounds.

The plaintiff declares upon a contract, and must prove that such a contract was made. For this purpose he lays before the Court two documents, the bought and sold notes signed by the parties. And no doubt, without explanation, the *primâ facie* conclusion would be that these documents contained a contract. But a document in the form of a "bought and sold note" signed by the parties

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is not necessarily a contract. It is always competent for the parties to adduce evidence of the circumstances under which the document was written. In order to establish a written contract it is necessary to prove, not merely that a certain paper bears the signatures of the parties, but that in so signing they made a contract. The case of *Pym v. Campbell* (a) establishes this proposition.

What then is the evidence that the defendants made such a contract here? The statement in the case is, that the plaintiff proposed to sell to the defendants certain bark at a price to be calculated from last year's prices with certain expenses added; and that the defendants thereupon, and on the faith of the plaintiff's representations, agreed to buy the bark on these terms.

This is the contract as stated by the arbitrator, but it is not the contract on which the plaintiff has declared.

How does the arbitrator state the circumstances under which the bought note was signed? He says that the plaintiff requested the defendants to sign a bought note, stating the nominal price at 6*l.* per ton, and stated to the defendants that they should not be called upon to pay more than the actual amount of the last year's prices and the expenses.

From this statement of fact the Court are to conclude whether or not the note so signed was intended by the parties to constitute the memorandum of a contract between them. It seems to me to negative instead of proving such an intention. It states the contract to be different from the note. The note was not signed as a memorandum of the contract, but was to contain a merely nominal price. The plaintiff fails upon the issue of non-assumpsit, and that is sufficient to decide the case.

The defendants are also, in my opinion, entitled to judg-

(a) 6 E. & B. 370.

ment upon the second issue. If there ever was such a contract between the plaintiff and the defendants as is contained in the bought and sold notes, it was avoided by the fraudulent representations which accompanied it. And this is not denied on the part of the plaintiff. But it is said that the defendants have adopted the contract after they were aware of the fraud. Fraud does not vitiate a contract necessarily, but at the election of the person defrauded. The defendants have it is said elected to stand by the fraudulent contract, and, after notice that the plaintiff claimed to treat the price in the bought and sold notes as a real price, they have adopted that view and have acted upon it.

Now the evidence as to this is the statement in the case of what took place at the meeting of the 3rd of August between Sir James Campbell and one of the defendants, which is as follows:—"The defendant told Sir James Campbell that the sale was made by the plaintiff as agent for the Crown, and that the price inserted in the bought and sold notes was a nominal price only; and that by the real arrangement the defendants were to pay only the last year's prices, and the expenses of carting and ricking." All therefore that the defendants did on the 3rd of August was to insist that the contract was not what appears by the written documents, but what the plaintiff had originally represented it. Not only is there no election to treat the bought and sold notes as the contract, but every act of the defendants manifests their determination, so far as was in their power, to adhere to the original contract. Thereupon they take the bark and pay for it. There is nothing to prevent them from setting up the fraud, and which they do successfully.

With regard to the claim for expenses, if it involve any doubt, I think the defendants should have leave to amend,

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by adding a plea of payment into Court. But in my opinion the defendants are entitled to judgment.

Judgment for the defendants (a).

(a) On the suggestion of the law and fact were to be settled by Court, the costs of the issues in *Bramwell, B.*, at Chambers.

June 8.

SENIOR v. THE METROPOLITAN RAILWAY COMPANY.

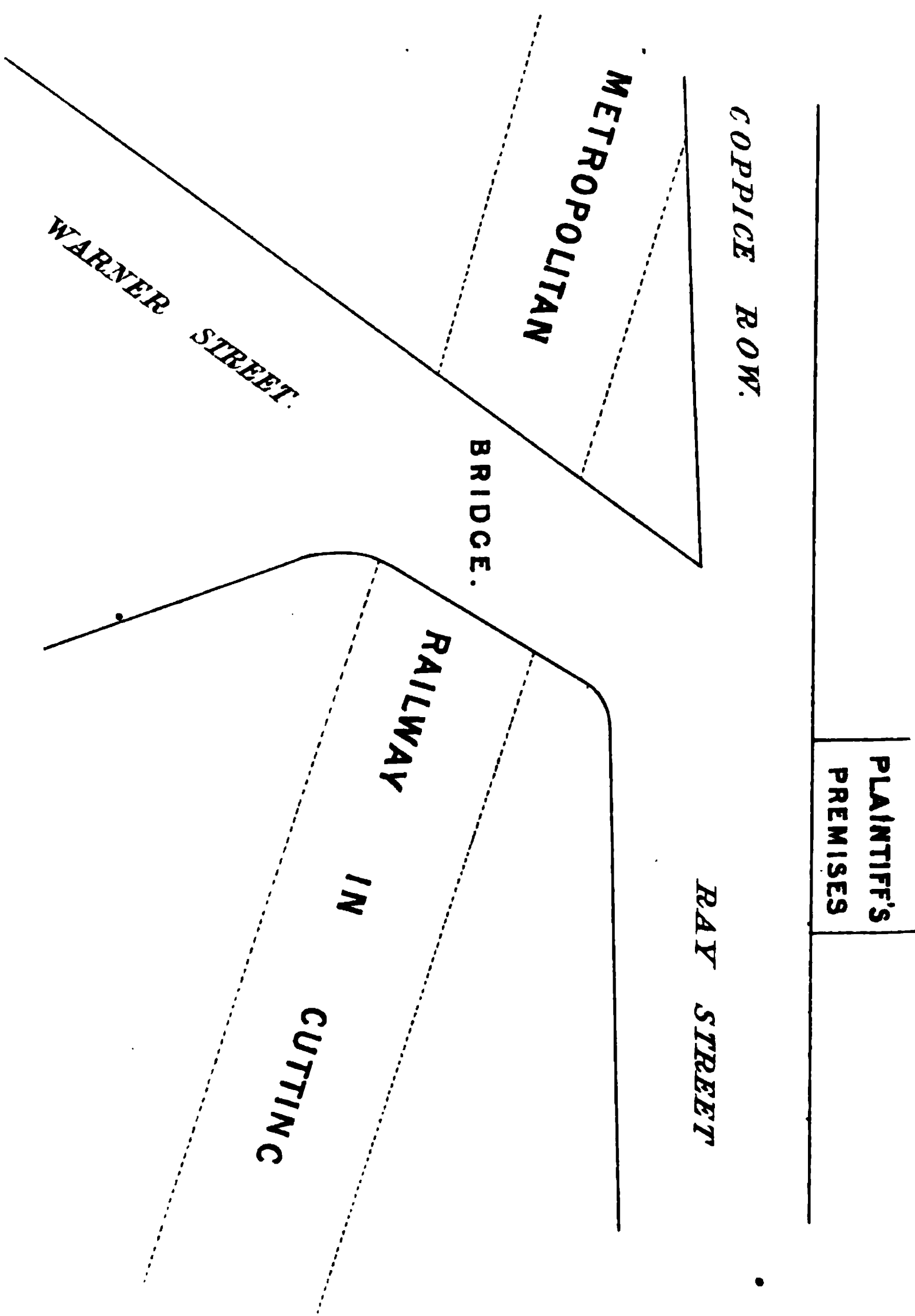
Loss of trade occasioned by the obstruction of a highway during the execution of the works of a railway Company, is an injurious affecting of the tradesman's interest in his premises, which entitles him to compensation under the 68th section of the Lands Clauses Consolidation Act, 1845.

THIS was an action by the plaintiff, the occupier of premises, No. 11, Ray Street, Clerkenwell, in the county of Middlesex, to recover the sum of 60*l.*, the amount ascertained by the verdict of a jury under the Lands Clauses Consolidation Act, 1845, as compensation for damage sustained by him by reason of the exercise of the powers vested in the defendants by the Metropolitan Railway Act, 1860, and 63*l.* 10*s.* the plaintiff's taxed costs of the proceedings.

By consent of the parties and order of a Judge, a case was stated for the opinion of this Court, as follows:—

1. The plaintiff became the occupier of the premises in question on the 24th of June, 1860, and from and since the 29th of September, 1860, has held them as tenant under an agreement bearing date the 29th of September, 1860, by which the immediate landlord demised them to him at the rent of 26*l.* per annum, payable on the usual quarter days, for a term of three years from the date last mentioned, and so on from year to year until the determination of the said tenancy by three months' notice in writing, to expire on any quarter day after the expiration of the said term of three years.

2. Ray Street is a public thoroughfare, leading westward



from Clerkenwell Sessions House, opening at its north-western extremity into another street in a straight line with it, called Coppice Row, and also communicating, by means of a bridgeway running north-westerly, with another street called Warner Street. The plaintiff's premises are about thirty yards from the junction of Ray Street and Coppice Row, and about the same distance from the said bridge-way, as shewn in the annexed plan.

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3. The plaintiff carried on in the premises the business of a tailor, such business consisting of the sale of ready-made clothes, exhibited by him for sale in the window of a shop facing Ray Street, part of the same premises; of mending clothes brought to be mended, and of making clothes to order.

4. While the plaintiff was so occupying the said premises, the defendants, for the purpose of constructing their railway, and in exercise of the powers vested in them by the Metropolitan Railway Act, 1860, and other Acts by which the Company is regulated and governed, the Railway Clauses Consolidation Act being one, stopped up for a considerable period of time the said bridgeway leading from Ray Street to Warner Street aforesaid, and they also for a period somewhat longer blocked up the carriage and partially obstructed the footway of the said street called Coppice Row, rendering the same impassable for carriages, and to some extent inconvenient for foot passengers, and in consequence thereof Ray Street was less used and frequented as a thoroughfare than before and since, and the number of persons passing through that street was considerably diminished.

5. During the same period the plaintiff's business fell off, principally in respect of the sale in the shop, and was in fact less than it had been before the said obstruction, and less than it has been since the same has been removed.

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6. On the 22nd of October, 1862, the plaintiff by his solicitor gave to the defendants the following notice :—

“ To the Metropolitan Railway Company.

“ As solicitor to C. J. Senior, of No. 11, Ray Street, in the parish of St. James, Clerkenwell, in the county of Middlesex, tailor and draper, and on his behalf, I hereby give you notice that the messuage or tenement, shop and premises, situate and being No. 11, Ray Street aforesaid, have been injuriously affected by the execution of the works in the construction of the said Metropolitan Railway; and that under and by virtue of a certain agreement dated the 29th day of September, 1860, and made between J. Mills, of Princes Street, Lambeth, in the county of Surrey, builder, of the one part, and the said C. J. Senior of the other part, the said J. Mills demised unto the said C. J. Senior the aforesaid messuage or tenement, shop and premises, No 11, Ray Street, aforesaid, for a term of three years from the day of the date of the said agreement, whereof eleven months and upwards are now unexpired, subject to the yearly rental of 26*l.*; and that he has during the execution of the said works held and occupied, and still holds and occupies the said messuage or tenement, shop and premises, and during all that time carried on his business therein; and that the said C. J. Senior claims 150*l.* for compensation for the damages and injury sustained by him in respect of the said messuage or tenement, shop and premises, and that if you are not willing to pay that amount, the said C. J. Senior desires to have the amount of compensation payable to him settled by a jury.

“ Henry Jones,

“ Solicitor for C. J. Senior,

“ 61, Chancery Lane, Oct. 22, 1862.”

On the 1st day of December, 1862, the defendants, pur-

uant to the Lands Clauses Consolidation Act, 1845, issued their warrant to the sheriff of Middlesex as follows:—

“ The Metropolitan Railway Company,

“ To the sheriff of the county of Middlesex.”

“ Middlesex, to wit.] Whereas, by an instrument in writing under the hand of H. Jones, as solicitor for C. J. Senior, of No. 11, Ray Street, in the parish of St. James, Clerkenwell, in the above mentioned county, dated the 22nd day of October, 1862, after alleging that the messuage and premises, No. 11, Ray Street, aforesaid, had been injuriously affected by the execution of the works in the construction of the said Metropolitan Railway, and alleging that the said C. J. Senior, at and during the time therein mentioned and referred to, was the occupier of the said messuage, and carried on his business therein, under and by virtue of an agreement for three years, whereof eleven months and upwards were then unexpired, the said C. J. Senior claimed the sum of 150*l.* for compensation for the damage and injury sustained by him in respect of the said messuage, and he gave the said Company notice that he claimed to have the question of such compensation settled by a jury, and unless the Company should be willing to pay the amount of compensation so claimed by him, he gave the Company notice, and required them to issue their warrant to the sheriff of the county of Middlesex to summon a jury for settling the same in the manner provided in and by the Lands Clauses Consolidation Act. And whereas, the Company have not taken or used any land or premises of the said C. J. Senior, and do not admit that he has sustained any damage as alleged, but, subject to and under protest, are willing to issue their warrant to the sheriff of the county of Middlesex to summon a jury to settle the amount of such compensation (if any) to be paid by the said Company to the said C. J. Senior. Now, therefore, the said Metro-

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politan Railway Company (subject to such protest) do, by this their warrant under their common seal issued to you the sheriff of the said county of Middlesex, require you to nominate and strike a special jury to determine and settle by their verdict the amount of compensation (if any) to be paid by the said Company to the said C. J. Senior in respect of the said messuage and premises having been or being injuriously affected by the execution of the works of the said Company.

“ Given under the common seal of the said Metropolitan Railway Company, the first day of December, A.D. 1862.”

And such proceedings were afterwards had thereon, that on the 8th of December, 1862, before the said sheriff and a special jury of the said county, duly summoned and sworn to inquire of and assess such compensation or damages as aforesaid, the plaintiff's said claim was inquired of according to law, and assessed by the said jury at the sum of 60*l.*, for which sum they gave their verdict and the said sheriff gave judgment, and such verdict and judgment were afterwards and before the commencement of this suit recorded according to law.

8. The plaintiff on such inquiry adduced evidence before the said jury for the purpose of shewing that his said premises had sustained some structural damage by reason of the exercise of the said powers of the defendants, and also evidence of the said obstruction and of the loss of trade as aforesaid, which, as he alleged, he had thereby sustained, and he claimed compensation for damage as well in respect of such alleged structural damage as of the loss by reason of such obstruction; but before the jury considered their verdict it was admitted by the counsel for the plaintiff that there was not sufficient evidence of structural damage, and the jury in fact found that no such structural damage had been sustained; and in delivering their verdict stated that

they assessed the compensation at the sum of 60*l.* for the loss of trade by reason of such obstruction only, and not for any structural damage to the premises, or for any matter or cause other than such obstruction.

For the purpose of this case it is admitted that the plaintiff had not nor has any other claim to compensation, except for the matter in respect of which the verdict was given.

9. The plaintiff's costs were afterwards taxed, pursuant to the Lands Clauses Consolidation Act, 1845, at 63*l.* 10*s.* 6*d.*

10. The plaintiff contends, and the defendants deny, that the plaintiff is entitled to have compensation made to him by the defendants in respect of the loss or damage so assessed by the jury at 60*l.*

The plaintiff further contends, and the defendants deny, that the plaintiff is entitled to the costs of the inquiry before the sheriff.

The questions for the opinion of the Court are:—First, whether the loss of trade sustained by the plaintiff by reason of such obstruction as aforesaid was damage in respect of which he was and is entitled to have compensation made to him by the defendants. Secondly, whether the plaintiff was and is entitled to his costs of the inquiry before the sheriff.

If both questions are answered in the affirmative, the judgment is to be entered for the plaintiff for 123*l.* 10*s.* 6*d.*, with costs of suit. If both questions are answered in the negative, judgment is to be entered for the defendants, with costs of suit. If the first question is answered in the negative and the second in the affirmative, judgment is to be entered for the plaintiff for 63*l.* 10*s.* 6*d.*, with costs of suit.

D. D. Keane, for the plaintiff.—The question is, whether the plaintiff's "loss of trade" by reason of the obstruction caused by the defendant's works, is an "injurious affecting" of land within the meaning of the 68th section of the Lands

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Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18). This case is not distinguishable in principle from *Chamberlain v. The West End of London and Crystal Palace Railway Company (a)*, where all the authorities are collected. Indeed, it is a stronger case than that ; for one access to the plaintiff's shop was stopped up for a considerable time, and another was partially obstructed and rendered impassable for carriages and inconvenient for foot passengers. It is found as a fact that the plaintiff's business consisted of the sale of ready made clothes exhibited in his shop window, and that during the obstruction his shop business fell off. [*Pollock, C. B.*—Suppose the street had been altogether blocked up and had ceased to be a thoroughfare.] It is clear that the plaintiff would have been entitled to compensation. In *Chamberlain v. The West End of London and Crystal Palace Railway Company (a)*, *Erle, J.*, in the course of the argument asked, "what is the boundary line between such an injurious affecting of land as entitles a person to compensation and such as does not?"

The Court then called on

Bridge, for the defendants.—The plaintiff has sustained no damage by reason of the obstruction except "loss of trade." The jury have expressly found that there was no structural damage ; so that the plaintiff's interest in the land was not injuriously affected. Under the 68th section of the Lands Clauses Consolidation Act, 1845, a party is only entitled to compensation "in respect of any lands, or of any interest therein, which shall have been taken for or injuriously affected by the execution of the works." Loss of trade is a mere personal injury. It may be that, although the plaintiff's business fell off while the obstruction existed,

(a) 2 B. & S. 605 ; in error, *Id.* 617.

when it was removed and the works completed his premises became more valuable. [*Pollock*, C. B.--Then if the obstruction continued for nine months or even nine years, would he be entitled to no compensation?] The Company would be entitled to set off against the claim for damages in respect of the temporary obstruction, the permanent increased value of the premises. In assessing compensation for land injuriously affected, a jury may take into consideration the loss of trade; but it is not of itself the subject of compensation within the 68th section of the Lands Clauses Consolidation Act, 1845. It is conceded that, if the jury had found that the plaintiff's lease was rendered of less value by the obstruction, he would have been entitled to compensation, but all that they find is that the plaintiff's business fell off. [*Channell*, B., referred to *Wilks v. The Hungerford Market Company* (a).] That case is an authority that loss of trade by the obstruction of a public thoroughfare is a personal damage for which the remedy is by action at common law. In *Chamberlain v. The West End of London and Crystal Palace Railway Company* (b) it was expressly found that the value of the plaintiff's houses was greatly diminished by the execution of the defendant's works. It is not true that in every case in which an action would lie against a railway Company for an obstruction not authorized by their Act, compensation may be obtained under the Lands Clauses Consolidation Act. The converse, however, is true. In *The Caledonian Railway Company v. Ogilvy* (c) Lord Cranworth said, "These acts of parliament are, as unfortunately is too often the case, loosely worded; but the construction that is put on this expression "injuriously affected," in the clauses in the act of parliament which gives compensation for injuriously affecting lands, certainly does not entitle the

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(a) 2 Bing. N. C. 281.

(b) 2 B. & S. 605.

(c) 2 Macq. 229. 235.

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owner of lands which he alleges to be injuriously affected, to any compensation in respect of any act which, if done by the railway Company without the authority of parliament, would not have entitled him to bring an action against them. I purposely guard myself by putting it in that way, because I am far from admitting that he would have a right of compensation in some cases in which, if the act of parliament had not passed, there might have been not only an indictment but a right of action. . . . If, therefore, the act of parliament did not mean to exclude the right of compensation in some cases, in which, if the Act had not passed, there would have been redress, every person who is stopped for a moment while the gates of a railway are shut at a level crossing, would be entitled to an action.” [Pollock, C. B.—The jury have assessed the injury done by the obstruction at 60*l*.] That amount is given as compensation for the loss of trade by reason of the obstruction.—He also referred to *Rose v. Groves* (a).

POLLOCK, C. B.—We are all of opinion, upon the finding of the jury and the questions submitted to the Court, that the plaintiff is entitled to judgment. It is admitted that, if the case had stated that the jury assessed the damage at 60*l*. in respect of the plaintiff's premises having been injuriously affected by the obstruction, excluding any mention of loss of trade, there would have been ground for compensation. But loss of trade is loss of goodwill; and goodwill is part of the value of the plaintiff's interest in the premises. It is suggested that the jury ought to have considered whether the land itself was injuriously affected; but we are bound to assume that they have taken into consideration everything which they ought to have considered. The questions propounded to us render it unnecessary to go into other mat-

ters; and it is sufficient to say that loss of trade is an injury to the value of the land itself, and therefore the subject of compensation under the Lands Clauses Consolidation Act.

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BRAMWELL, B.—I am of the same opinion. In the first place, I think this case is decided by the case of *Chamberlain v. The West End of London and Crystal Palace Railway Company*. Secondly, I think it is decided, by what I have always understood to be the principle of these cases, that where premises are damaged under such circumstances that but for the parliamentary powers an action would be maintainable against the Company, the party interested in the premises is entitled to compensation under the Lands Clauses Consolidation Act. It seems to me that it is an injurious affecting of premises to obstruct the access to them so that the business there carried on cannot be carried on so profitably. Therefore, both on principle and authority, I think the plaintiff is entitled to recover.

At first I thought that the contention of Mr. *Bridge* was one of words only; but I now understand it as one of substance, because he says that, although the works of the Company may at one time have injured the premises, at another time they may benefit them. It is certainly possible that the obstruction may have been caused by pulling down the opposite houses and widening the road, by which the plaintiff's premises may have become far more valuable. But I doubt whether the Company are entitled to a set-off of that description, because, if the freeholder were in possession, according to Mr. *Bridge's* argument he would get nothing, while a tenant from year to year, or a tenant for a term co-extensive only with the continuance of the obstruction, would be entitled to compensation. It would be monstrous to say that a tenant

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from year to year, or for a shorter term, ought not to be compensated because, if there had been no term and the premises were in the occupation of the freeholder, no compensation would have been payable to him. It seems to me that such a set-off ought not to be allowed, since it would lead to such absurd consequences. Again, suppose a man has two neighbouring houses, the one benefitted, the other injured by the Company's works, is he not to get compensation for the one that is injured because the other is benefitted? Therefore I cannot accede to Mr. *Bridge's* proposition, that any benefit done by the Company to the premises must be deducted by way of set-off against the damage. It must not be understood that I differ from anything said by Lord *Cranworth* in the case of *The Caledonian Railway Company v. Ogilvy (a)*, but that was upon a different matter. Further, I do not think any question of benefit to the premises is now open. It might have been a matter for the consideration of the jury in assessing the compensation, but not having been brought before them there is an end of it.

CHANNELL, B.—I am of opinion that the questions submitted to us must be answered in the affirmative. The second question relates entirely to the costs of the inquiry, and can be easily answered when a satisfactory answer has been given to the first. It is contended on the part of the plaintiff, that upon the facts stated in the case unqualified by other facts which may exist, but which are not stated, he is entitled to compensation. If that be admitted, the rest follows as a matter of course.

Now, giving the fullest effect to the proceedings of a technical character, whatever is technical is right. The defendants by their warrant required the sheriff to summon a jury to determine the compensation (if any) to be paid to

(a) 2 Macq. 229.

the plaintiff "in respect of the said *messuage and premises having been or being injuriously affected* by the execution of the works of the Company." The sheriff summoned a jury to assess such compensation, and they assessed it at 60*l*. Then there is the fact of loss of trade occasioned by an obstruction which existed for a considerable period of time, but has now been removed. No other facts are stated to qualify that. Admitting that loss of trade, though some evidence of injury to the plaintiff's interest in the premises, might be counterbalanced by other considerations, those considerations ought at least to have been stated in the case, so as to enable us to deal with them. The present unqualified statement shews that, in point of fact, the plaintiff's premises were injuriously affected by the execution of the defendant's works. For these reasons I think that both questions must be answered in favour of the plaintiff.

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WILDE, B.—I am of the same opinion, and for the reasons given by the rest of the Court.

I doubt whether, in a case of compensation for injury to land, a Company can claim a set-off by reason of the land being subsequently benefitted. It is obvious that where a railway passes through a neighbourhood, wherever there is a station the adjacent premises may be greatly benefitted. But if any individual happens to have a portion of his land taken he is entitled to be paid the value of that land: if his land is injuriously affected, he is entitled to compensation for the injury. If the Company were entitled to set off the benefit derived from proximity to the station, one individual would be made to pay something for that, whereas his neighbour would pay nothing. It is the first time such an idea has been brought forward, and I see no reason for giving countenance to it.

Judgment for the plaintiff.

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In the Matter of a Recognizance made to her Majesty,
by JOHN CHAPLIN and ADAM STEELE, as Sureties for
MURDO YOUNG.

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And in the Matter of JONES v. YOUNG.

Upon an application for leave to proceed against sureties upon their recognizance or bond to the Crown under the 11 Geo. 4 & 1 Wm. 4, c. 73, the Court of Exchequer acts judicially, not ministerially, and may refuse the application if, upon the facts before them, they are of opinion that the plaintiff is not entitled to proceed against the sureties.

Therefore where the plaintiff brought an action for libel against the editor of a newspaper, and a verdict was taken by

consent for 2000*l.*, subject to the award of an arbitrator, who ordered the verdict to be reduced to 250*l.* provided the defendant published an apology in his newspaper within a certain time, and the award was not taken up until long after that time by the plaintiff, who afterwards agreed to accept 1100*l.* in satisfaction of damages and costs, of which 650*l.* was paid by the defendant, who gave his acceptances for the remainder, the Court refused to order proceedings to be taken against the sureties upon their recognizance.

D. D. KEANE had obtained a rule calling upon the Attorney General, John Chaplin, and Adam Steele, to shew cause why a writ or writs of scire facias should not issue out of this Court against the said John Chaplin and Adam Steele for the recovery of the amount of the above mentioned recognizance and costs.

The affidavit of the plaintiff, in support of the application, stated he brought an action in the Court of Common Pleas against Murdo Young, the editor, proprietor, and publisher of a newspaper called "The Sun," for a libel; which came on for trial at the Surrey Spring Assizes, 1857, when a verdict was entered for the plaintiff for 2000*l.*, and costs 40*s.*, subject to the award of an arbitrator, who by his award, dated the 29th June, 1857, ordered that the verdict so entered should stand, but that the amount of damages should be reduced to 250*l.*; that the costs of the reference and award should be paid by the defendant on or before the 1st of August then next, and that the defendant should in every copy of his newspaper which should be published on a day therein named, insert an apology; and that if the

apology in the award set forth should not be inserted, the verdict so found should stand, and that the damage should not be reduced as by the award was directed.

The apology was not and had not been inserted as directed, and the plaintiff caused final judgment to be signed against the defendant for 2000*l.*, the amount of the damages, and 40*s.* costs. The defendant afterwards paid the plaintiff 693*l.*, leaving a balance of 1307*l.*, or thereabouts, which still remained due; and afterwards the plaintiff caused a writ of fieri facias to be issued, and lodged with the sheriff of the county of Middlesex, against the goods of the defendant, indorsed to levy 1307*l.*, and costs of execution and interest, to which the sheriff returned "nulla bona." Pursuant to a memorial the Attorney General, on the 30th of April, 1863, granted his fiat to the plaintiff to enable him to make the present application to the Court.

The affidavits in answer to the rule stated, that the plaintiff's attorney neglected to take up the award until the 3rd of August, 1858, when for the first time the defendant and his sureties ascertained that the arbitrator had directed that the apology should be inserted in the newspaper published on the 8th of July, 1857, or any other day between that day and the 15th of July: that the direction as to the apology not having been known to the defendant or his attorney for more than a year after the time limited for the insertion, it became impossible to comply with the direction, and neither the plaintiff nor his attorney requested the apology to be inserted in the newspaper at any time.

A motion to set aside the award was not made in consequence of the defendant instructing his attorney not to do so, as he hoped to effect a compromise with the plaintiff's attorney. In November, 1858, a compromise was effected between the parties by the plaintiff agreeing to accept a sum of 1100*l.* in satisfaction of damages and costs; 695*l.* of which

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had been paid to the plaintiff by the defendant, and his acceptances payable at future days were taken by the plaintiff for the residue.

Manisty shewed cause.—By the 60 Geo. 3 & 1 Geo. 4, c. 9, s. 8, no person shall print or publish for sale any newspaper, &c., until he shall have entered into a recognizance, or executed a bond, together with two or three sureties, in manner and to the amount therein specified, conditioned for payment of every such *fine* or *penalty* as may be imposed upon or adjudged against him by reason of any conviction for printing or publishing any blasphemous or seditious libel. The 11 Geo. 4 & 1 Wm. 4, c. 73, s. 2, after reciting the 60 Geo. 3 & 1 Wm. 4, c. 9, and that it is expedient to increase the amount of such recognizances and bond, and to extend the same for the purpose of securing the payment of damages and costs in actions for libels, enacts, that the amount of such recognizances and bonds shall be extended to 400*l.* for the principal and the like sum for the sureties in any such new recognizances, and to the sum of 300*l.* for the principal and the like sum for the sureties in any such new bond; and that the conditions of such new recognizances and bonds respectively shall extend to secure the payment of *damages* and *costs* to be recovered in actions for libels published in such newspapers. Section 3 enacts, “That if any plaintiff, in any action for libel against any editor, conductor, or proprietor of such newspaper, &c., shall make it appear by affidavit to his Majesty’s Court of Exchequer that he is entitled to have execution against the defendant upon any judgment in such action; but that he has not been able to procure satisfaction by writ of execution against the goods and chattels of the defendant, it shall be lawful for the said Court, for the benefit of such plaintiff, to order and direct such proceedings to be had

and taken upon such recognizances or bonds respectively as would be taken to obtain any fines or penalties due to his Majesty secured by such recognizance and bond." There are several objections to this application. First, the plaintiff was not entitled to sign judgment for 2000*l*. The award not having been taken up until long after the time had elapsed for the defendant to publish the apology, it was impossible for him to comply with that direction, and the award was either void or only entitled the plaintiff to sign judgment for 250*l*. Secondly, the matter has been compromised by the plaintiff agreeing to accept 1100*l*. in satisfaction of the damages and costs, of which 650*l*. has been paid, and the defendant has given his acceptances for the residue. The giving time to the defendant operated as a discharge of his sureties. Thirdly, it is not enough that "nulla bona" has been returned to the writ of scire facias, but the plaintiff ought to have shewn that he has used every endeavour to obtain payment from the defendant.

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The Court then called on

D. D. Keane, to support the rule.—The plaintiff has obtained a judgment in the Court of Common Pleas, which in this Court must be assumed to be valid, and therefore it is imperative on the Court to enforce it in the manner provided by the 11 Geo. 4 & 1 Wm. 4, c. 73, s. 3. The Court cannot inquire into any other facts than whether the plaintiff has obtained a judgment which is unsatisfied. [*Pollock*, C. B.—The statute says, "if it shall appear to the Court that the plaintiff is entitled to have execution."] The validity of the award which was made in 1857 has never been questioned, and upon this application it is not competent to the defendant to object to it: *Davies v. Pratt* (a). It was as much the duty of the defendant as

(a) 17 C. B. 183.

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the plaintiff to take up the award, and, no apology having been published, the plaintiff was entitled to sign judgment for 2000*l*. The sureties cannot avail themselves of the defendant's neglect, for it was their duty to see that he took up the award: *Wright v. Simpson* (a). The giving time to the defendant did not operate as a discharge of the sureties, because their liability did not arise until the plaintiff issued execution and failed to obtain satisfaction of his judgment. The doctrine as to the discharge of a surety by giving time to the principal does not apply to a judgment any more than to a replevin bond: *Moore v. Bowmaker* (b). In *Pooley v. Harradine* (c) and *Strong v. Foster* (d) there were circumstances which rendered it inequitable that the sureties should be liable. Moreover, if the rule be granted and a scire facias issues all these questions may be raised on the record, but if the rule be discharged there is no appeal.

POLLOCK, C. B.—I am of opinion that the rule ought to be discharged, and as the 3rd section of the 11 Geo. 4 & 1 Wm. 4, c. 73, says “that the expense of such proceeding shall be exclusively borne by such plaintiff,” the rule must be discharged with costs. That section also says, “that if any plaintiff in any action for libel against any editor, conductor, or proprietor of a newspaper, &c., *shall make it appear* by affidavit to this Court *that he is entitled to have execution* against the defendant upon any judgment in such action, but that he has not been able to procure satisfaction by writ of execution against the goods and chattels of the defendant, *it shall be lawful* for the said Court to order and direct such proceedings to be had and taken upon such recognizances or bonds respectively as would be taken to obtain any fines

(a) 16 Ves. 714.

(b) 6 Taunt. 379.

(c) 7 E. & B. 451.

(d) 17 C. B. 201.

or penalties due to his Majesty secured by such recognizance and bond." I apprehend that our duty under this act of parliament is not merely ministerial but judicial, and that upon such an application we have not only the right but are bound to inquire whether the circumstances are such as to entitle the plaintiff to proceed against the sureties; and under the circumstances of this case I think we ought not to act upon the power which the statute has conferred on us.

It appears by the affidavits that an action was brought by the plaintiff against the defendant for publishing a libel in his newspaper. The cause came on for trial in the year 1857, when a verdict was entered by consent for 2000*l.*, (I presume the damages in the declaration), subject to the award of an arbitrator, with power for him to direct what should be done by the parties. In June, 1857, the arbitrator made his award and thereby directed that the damages should be reduced to 200*l.* provided an apology was published by the defendant in his newspaper within a time named; and that in the event of its not being so published the damages should stand at 2000*l.* The award was not taken up until after the time had elapsed within which the apology was to be published. It was the plaintiff's duty to take up the award, and the consequences of his neglect cannot be repelled by saying that the defendant might have taken it up. As to the sureties, it is clear that they could not have taken it up. Then, the award not having been taken up until after the period for publishing the apology had expired, it was too late for the defendant to publish it; but whose fault was that? Certainly not the defendant's. If an application had been made to the Court of Common Pleas, it is probable that they would either have said that the award was a nullity, or that it should only be available to the extent of 250*l.*, and more than that has been paid to the plaintiff.

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Considering all these facts, I think that the indorsement on the postea, that the jury found a verdict with 2000*l.* damages is incorrect, and that the plaintiff was not entitled to sign judgment for that amount. The entry was the act of the attorney or his clerk, and not the judgment of the Court of Common Pleas.

Then, the award having been taken up, the plaintiff and defendant came to an arrangement for payment of a definite sum in satisfaction of the damages and costs. Accordingly, the defendant paid to the plaintiff a part of the amount, and gave him his acceptances for the residue. I express no opinion as to how far the giving time to the principal operated as a release of the sureties. I think that the plaintiff has no right to recover more than 250*l.*, and that this Court, having all these facts before it, ought not to order a scire facias to issue.

CHANNELL, B.—I am also of opinion that this rule should be discharged and with costs. I agree with the Lord Chief Baron that upon an application of this kind, we have not only the right but are bound to inquire into the facts. Since he has fully stated them, I abstain from repeating them; neither do I express any opinion as to whether the giving time to the principal operated as a release of the sureties.

The two acts of parliament to which our attention has been directed must be read together. The first, 60 Geo. 3 & 1 Geo. 4, c. 9, requires every printer or publisher of a newspaper to enter into a recognizance or bond, with sureties, for securing payment of *fin*es and *penalties* upon convictions for libel. That Act contemplates proceedings of a criminal nature, by indictment. The second Act, 11 Geo. 4 & 1 Wm. 4, c. 73, increased the amount of the recognizances and bonds, and extended the liability of the sure-

ties to payment of *damages* and *costs* to be recovered in actions for libel. This Court can only give effect to that provision when called upon to direct such proceedings as it might have ordered to obtain any fine or penalty under the former Act. We are now asked to apply the remedy provided by the latter Act. The 3rd section of that Act gives power to this Court to order and direct such proceedings to be had or taken upon such recognizances or bonds respectively as would be taken to obtain any fines or penalties, if the plaintiff shall make it appear by affidavit that he is entitled to execution against the defendant, and cannot procure satisfaction by execution against his goods and chattels. I do not propose to interfere with the judgment against the defendant, for that cannot be questioned upon this application; and when we are asked to enforce the judgment against the sureties, all we have to consider is whether it ought to be enforced against them. The judgment may be good as against the defendant, and nevertheless proceedings ought not to be taken upon it against the sureties. We ought to ascertain whether the award of the arbitrator has been properly carried out, and I agree with the Lord Chief Baron that the plaintiff had no right to sign judgment for 2000*l*. This being an application to the only Court in which it can be made to enforce a judgment against persons who are not parties to it, I agree that upon the facts before us we ought not to order a writ of scire facias to issue.

WILDE, B.—I am of the same opinion. Indeed, I think the case clear. The plaintiff brought an action for libel against the defendant, an editor of a newspaper, and obtained a judgment in the Court of Common Pleas. The plaintiff's counsel is quite right in saying that we neither can nor will interfere with that judgment. Having that judgment, the plaintiff now asks for execution against the sureties, under

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3rd section of the 11 Geo. 4 & 1 Wm. 4, c. 73; but, in my opinion, the plaintiff has not shewn any right to execution against them. The plaintiff applies to this Court under the terms of a special act of parliament, and says, that, having recovered judgment against the defendant in an action for a libel published in his newspaper, this Court is bound to award a scire facias upon the recognizance; in other words, to enable the plaintiff to issue execution against the sureties. If we were merely ministerial officers, and the mere fact of the existence of a judgment in the Court of Common Pleas were enough to entitle the plaintiff to proceed against the sureties, he would be right. But the act of parliament does not say that if the plaintiff cannot obtain satisfaction against the defendant he shall be entitled to issue execution against the sureties—which it ought to have said, if the plaintiff's argument is correct. The act of parliament says, that the plaintiff may come to this Court, and if he shall make it appear by affidavit *that he is entitled to execution against the defendant*, and has not been able to procure satisfaction by execution against his goods, *it shall be lawful* for the Court to order proceedings upon the recognizance.

It is contended that the plaintiff has *a right* to come to this Court and get execution against the sureties; but the language of the statute does not warrant that assertion: it confers on us the power to act, not ministerially, but judicially, by inquiring into the facts and satisfying ourselves that the plaintiff is entitled to execution upon the judgment. The facts plainly shew that this plaintiff is not so entitled. The sum of 2000*l.* was merely a formal entry of the amount of damage upon a verdict taken by consent, subject to the award of an arbitrator. The arbitrator awarded that the damages should be reduced to 250*l.*, and that the defendant should publish an apology in his newspaper within a certain

time; if not, the verdict should stand for 2000*l*. If the plaintiff had taken up the award in proper time, and the defendant had refused to publish the apology, the plaintiff might, with some show of reason, have applied to this Court for execution as upon a judgment for 2000*l*. But the plaintiff did not take up the award until long after the time for publishing the apology had elapsed, so that the defendant never knew in time that he was required to make an apology, and now the plaintiff asks for damages to the amount of 2000*l*., although the defendant has made no default. To grant such an application would be contrary to the common principles of justice. I am not satisfied that the plaintiff is entitled to execution upon his judgment, and I, therefore, think that the rule ought to be discharged, with costs.

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Rule discharged, with costs.

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June 11.

EJECTMENT for a cottage and garden. The defendants defended as landlords.

At the trial, before *Williams, J.*, at the last Spring Assizes for the county of Suffolk, it appeared that in 1837, and before the mortgage next mentioned was executed, Robert Ford, the then owner in fee, put his illegitimate son Quinton into possession of the land now

The owner in fee of certain land, prior to mortgaging it for a term of years, put A. into possession. A. occupied for twenty-five years without payment of rent or written

acknowledgment of the mortgagor's title. A. then conveyed in fee to the plaintiff and after attorning to him as his tenant gave up possession for a sum of money to B., the representative of the mortgagor, and C. the executor of the mortgagee (whose mortgage had been kept alive by payment of interest). B. and C. afterwards joined in a conveyance of the premises to the defendants.—*Held*, in an action of ejectment, first, that the defendants were not estopped from setting up their title to the premises; secondly, that they were persons claiming under a mortgage within the meaning of the 7 Wm. 4 & 1 Vict. c. 28, and consequently that the 3 & 4 Wm. 4, c. 27, did not operate to bar their title.

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in dispute, and Quinton occupied from that time until the 10th of January, 1862, without payment of rent, and without ever making any written acknowledgment of his father's title. By deed, dated the 15th of December, 1837, Robert Ford mortgaged the property for a term of 1000 years. The mortgagee died in 1842 and his executor proved his will. In 1848 Robert Ford conveyed to William Hawkins subject to the mortgage. The interest on the mortgage was paid to the mortgagee during his life, and to his executors after his death until 1848. A demand of possession was then made on Quinton by the mortgagees, and also by Hawkins. Quinton refused to go out, and on the 10th of June, 1862, executed a conveyance of the property to John Ford the plaintiff, but continued in possession, the plaintiff letting the premises to him from that date up to the 6th of April, 1862. On the 20th of February, 1862, a writ of ejectment was issued against Quinton at the suit of one of the mortgagee's executors and William Hawkins, and on the 5th of April, 1862, Quinton was induced to take from them a sum of 5*l*. and give up possession. In June, 1862, the mortgagee's executors and Hawkins joined in a conveyance to the plaintiff. Upon these facts being proved a verdict was entered for the plaintiff, with leave to the defendant to move to enter a nonsuit, the Court to have power to draw inferences of fact.

D. D. Keane, in last Easter Term, obtained a rule nisi accordingly, on the grounds that the defendants were persons entitled to or claiming under a mortgage of the land sought to be recovered made by a mortgagor not barred at the time of making it, and that interest on the money secured by such mortgage had been paid within twenty years next before the writ; and also on the ground that the defendants were in possession, and that, on the facts proved, those claiming under Robert Ford were not barred as against

William Ford and those claiming under him, nor those claiming under the said William Ford shewn to be entitled to eject.

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Phear (*O' Malley* with him) shewed cause (June 9, 10).—First, the defendants are estopped from denying the plaintiff's title until they restore possession of the land: *Doe d. Bullen v. Mills* (a), *Doe d. Johnson v. Baytop* (b). It is, indeed, laid down in Co. Litt. 47, b., that “if a man take a lease for years of his own land by deed indented, the estoppel doth not continue after the term ended; for by the making of the lease the estoppel doth grow, and consequently by the end of the lease the estoppel determines.” But in *Bayley v. Bradley* (c), *Wilde*, C. J., after citing that passage, says:—“The only qualification I am aware of, that has been engrafted upon that rule, is that if the tenant *came into possession* under the lessor he must restore the possession before he disputes the title.”

Secondly, upon the facts proved the plaintiff is entitled to recover. If Robert Ford had not mortgaged the property, Quinton, (whether he occupied as tenant at will or with the permission of Robert Ford), would have acquired, under the 3 & 4 Wm. 4, c. 27, s. 7, a title which would have barred all persons: *Doe d. Thompson v. Thompson* (d). The question then is, whether the fact of a term of years having vested in the mortgagee has altered the case by reason of the 7 Wm. 4 & 1 Vict. c. 28, which enables mortgagees and persons claiming under them to bring actions to recover land within twenty years after the last payment of principal or interest, although more than twenty years may have elapsed since the right of entry accrued. In *Doe d. Palmer v. Eyre* (e), it was held that that enact-

(a) 2 A. & E. 17.

(b) 3 A. & E. 188.

(c) 5 C. B. 396. 400.

(d) 6 A. & E. 721.

(e) 17 Q. B. 366.

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ment was general, and preserved to a mortgagee the same right of entry as if the 3 & 4 Wm. 4, c. 27, had not passed, and that if the possession has never been such as before that Act would have been adverse the mortgagee is entitled to recover. This case however is distinguishable. In *Doe d. Palmer v. Eyre* there was no evidence to shew that the party in possession was not tenant to the mortgagee. Here the premises were mortgaged for a term of years at the time a person was in possession as tenant at will, and the mortgagee took no steps to create the relation of landlord and tenant between them. The mortgage severed the tenancy at will and merely created an interesse termini in the mortgagee, which is not within the statute (a).

D. D. Keane, in support of the rule.—First, there is no estoppel. Possession was surrendered by Quinton to get rid of the then pending ejectment. [*Bramwell*, B.—The possession was not given up under pressure of the ejectment, but in consequence of a sum of money being paid to obtain possession.] At all events, the plaintiff is precluded from setting up the estoppel. The plaintiff relies on a purchase from Quinton. Quinton's interest was derived from those whom the defendants represent. If Quinton is estopped from denying the defendants' title, so is the plaintiff.

Secondly, the defendants are not barred. The cases of *Doe d. Palmer v. Eyre* (b), and *Doe d. Baddeley v. Massey* (c), are decisive as to the true construction of

(a) The plaintiff's counsel raised no point as to the mortgage term being merged in the fee. It is, however, to be observed that by the 3 & 4 Wm. 4, c. 27, s. 34, the remedy is not merely barred when the period for making an entry is determined, but the right and title in

the land of the person, whose remedy is barred, is thereby *extinguished*; so that if he enter after that period he is a mere wrong-doer as against any person who happens to be in possession: *Holmes v. Newlands*, 11 A. & E. 44.

(b) 17 Q. B. 366.

(c) 17 Q. B. 373.

7 Wm. 4 & 1 Vict. c. 28. In the latter case, although the mortgage had been paid off, and the purchaser had taken a conveyance, in which the mortgagor and mortgagee joined, of the premises, and of the mortgagor's equity of redemption, it was held that the purchaser was a person "claiming under a mortgage" within the meaning of the 7 Wm. 4 & 1 Vict. c. 28.—He was then stopped by the Court.

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POLLOCK, C. B.—I am of opinion that this rule should be made absolute. The objection, that before any question of title is gone into the defendants must restore possession of the land, has not been sustained.

The other question is upon the merits. The defendants claim under a mortgage by the owner. Upon this mortgage interest has been paid within twenty years before this action commenced. The plaintiff claims under a purchase from one who, before the execution of the mortgage (15th of December, 1837), was put into possession of the land by the mortgagor as his tenant, and who remained in possession down to the year 1862, without ever paying rent. The question raised is concluded by authority. But apart from authority I think it clear that, as against those who claim under the mortgagee, the plaintiff has no title.

CHANNELL, B.—I am of the same opinion. I do not dispute the authority of *Doe d. Bullen v. Mills* (a); but the present case appears to me distinguishable. Although up to a certain point it resembles that case in its facts, it differs in the circumstances under which the plaintiff's tenant was originally let into possession. The defendants do not seek to dispute the plaintiff's title, but to shew an affirmative title in themselves, from which any title the plaintiff had was derived.

(a) 2 A. & E. 17.

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Upon the other point the authorities are decisive. The estate and interest of the original mortgagee are vested in the defendants, and they claim under a mortgage on which interest has been paid within twenty years before this action was brought.

Rule absolute.

June 3.

THE OVERSEERS OF THE PARISH OF STAPLE INN, Appellants, THE BOARD OF GUARDIANS OF HOLBORN UNION, Respondents.

After the 20 Vict. c. 19 passed, two justices appointed an overseer for S., which at the time that Act passed was an extra-parochial place having no poor and no poor rate. Afterwards the Poor Law Commissioners ordered that it should be added to a Union; and the guardians of the Union ordered that it should contribute to the common fund 50*l*. No expenses had ever been incurred by the Union on behalf of S., and it still had no poor and no poor rate.—*Held*: first, that the order of annexation was good; secondly, that S., being annexed to the Union, became liable to contribute to its common fund, in manner provided by the 24 & 25 Vict. c. 55, s. 9.

CASE stated by justices, under the 20 & 21 Vict. c. 43, for the opinion of this Court, as follows:—

1. At a special session duly held before us, two of her Majesty's justices of the peace for the county of Middlesex, acting within the district wherein the parish of Staple Inn is situate, H. S. Pownall, the overseer of the said parish, appeared to shew cause why a certain contribution of 50*l*, required by order of the Guardians of the Holborn Union, dated in May 1862, to be paid to the said Union by the said parish of Staple Inn, had not been paid.

2. The following facts were proved and undisputed:—


3. The Holborn Union was duly formed in March, 1836, soon after the passing of the 4 & 5 Wm. 4, c. 75.

4. At that time and long afterwards Staple Inn was extra-parochial, having no overseers, no poor, no poor rates, and it was not included in the said Union. It was entered separately as extra-parochial in the report of the

Registrar General on the census of 1851. It was enacted, by the 20 Vict. c. 19, s. 1, that "after the 31st day of December, 1857, every place entered separately in the report of the Registrar General on the last census which now is or is reputed to be extra-parochial, and wherein no rate is levied for the relief of the poor, shall, for all the purposes of the assessment to the poor rate, the relief of the poor, the county, police, or borough rate, the burial of the dead, the removal of nuisances, the registration of parliamentary and municipal voters, and the registration of births and deaths, be deemed a parish for such purposes, and shall be designated by the name which is assigned to it in such report; and the justices of the peace having jurisdiction over such place, or over the greater part thereof, shall appoint overseers of the poor therein; and with respect to any other place being, or reputed to be, extra-parochial, and wherein no rate is levied for the relief of the poor, such justices may appoint overseers of the poor therein, notwithstanding anything contained in the 101st chapter of the statute passed in the session of parliament of the 7th and 8th years of her present Majesty."

5. In pursuance of this Act the justices appointed an overseer for the parish of Staple Inn, and afterwards, on the 25th of August, 1858, the Poor Law Commissioners made an order that the said parish of Staple Inn should, on and from the 29th of September then next, be added to the Holborn Union.

6. No expenses have ever been incurred by the Union for or on behalf of the parish of Staple Inn for the relief of poor belonging to that parish. The said parish has not and never has had any poor; no rate has ever been made since it became a parish; consequently no claim for contribution to the common fund or otherwise of the said

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Union has ever been made upon the parish of Staple Inn until the claim in question.

7. The making of the contribution order, and the service on Pownall, the overseer, and demand and refusal of payment, were proved and admitted.

8. The present claim is made under the provisions of the 24 & 25 Vict. c. 55, s. 9, which enacts, "And whereas it is also expedient to alter the mode in which the contributions of parishes to the common fund of the Union in which they are comprised are now calculated: Be it therefore enacted, That after the 25th day of March next the several parishes comprised in any Union already formed or hereafter to be formed under the provisions of the 4 & 5 Wm. 4, c. 76, shall contribute to the common fund thereof, in proportion to the annual rateable value of the lands, tenements, and hereditaments in such parishes respectively assessable by the laws in force for the time being to the relief of the poor, and in no other manner, whether the lands, tenements, and hereditaments shall be actually rated or not, and whether the rate levied shall be collected in full or upon any composition: Provided always that nothing herein contained shall alter or affect the liability of any parish comprised in any such Union in regard to any charge lawfully created in the said Union, and secured upon the poor rates of all or any of the parishes comprised therein, which shall have been created at any time previous to the said 25th day of March; but the same shall continue to be charged and payable in like manner as it would by law have been charged and payable if this Act had not been passed; provided also that nothing herein contained shall apply to any contribution which shall be in arrear from any parish in such Union on the said 25th day of March, but the same shall be recoverable and shall be

applicable in the same manner as if this Act had not been passed."

9. It was proved and admitted that the sum so claimed was the proper contribution of Staple Inn to the common fund under this section, if it is liable to contribute at all; but it was objected, on the part of the parish of Staple Inn, that it had never become part of the Holborn Union, and even if it had, inasmuch as it had never yet contributed to the common fund of this union, and the above section was passed to alter the mode in which contributions of parishes to the common fund of the union in which they are comprised had been previously calculated, that the section did not apply to Staple Inn, and that it is not now liable to contribute under the provisions of the above section.

10. It was our opinion that the parish of Staple Inn is liable to contribute, and we made the order for payment of the said contribution accordingly.


11. The overseer of the parish of Staple Inn being dissatisfied with our determination, as being erroneous in point of law, has duly applied to us to state a case setting forth the facts and grounds of our determination for the opinion thereon of the Court of Exchequer, under the provisions of the 20 & 21 Vict. c. 43, which, with the concurrence of the union, we have consented to do in the form agreed to by both parties, so far as we lawfully may or can under the said statute.

The opinion of the Court is therefore requested whether, upon the facts here stated, the parish of Staple Inn is or is not liable to contribute to the common fund of the Holborn Union.

Manisty (*Hopwood* with him), for the respondents.—By the Poor Law Amendment Act, 4 & 5 Vict. c. 76, s. 26, the Poor Law Commissioners are empowered to form parishes

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into a union. The case finds that the Holborn Union was formed in March, 1836, after the passing of that Act; and that, at that time and long afterwards, Staple Inn was extra-parochial, and, having no poor or poor rates, was not included in the union. By the 20 Vict. c. 19, s. 1, after the 31st of December, 1857, every extra-parochial place where no poor rate is levied shall be deemed a parish for the purposes of assessment for the relief of the poor, and the justices having jurisdiction over such place may appoint overseers of the poor therein. The justices, in pursuance of that Act, appointed an overseer for the parish of Staple Inn, and on the 25th August 1858, the Poor Law Commissioners made an order annexing it to the Holborn Union from the 29th of September in that year. Then, by the 28th section of the 4 & 5 Wm. 4, c. 76, the parish of Staple Inn became liable to contribute its proportion to the expenses incurred for the common use or benefit of the parishes included in the union. *Regina v. Boteler* (a) is an express authority that, under the 32nd section of the 4 & 5 Wm. 4, c. 76, the Poor Law Commissioners had power to add the parish of Staple Inn to the Holborn Union without the consent of the owners or occupiers. Then, the parish of Staple Inn having been comprised in the union at the time the 24 & 25 Vict. c. 65 passed, by the 9th section of that Act became liable to contribute to the common fund in proportion to the annual rateable value of the lands in the parish assessable to the relief of the poor.

The Court then called on


Pickering (with whom was *Crompton Hutton*), for the appellants.—The Poor Law Commissioners had no power to add Staple Inn to the Holborn Union. The object of

(a) 32 L. J., Mag. Cas. 91.

the 4 & 5 Wm. 4, c. 76, was not to create a new liability under the poor law, but to provide for the uniform administration of it. By the 26th section, notwithstanding the union, each parish "shall be separately chargeable with and liable to defray the expense of its own poor." And by the interpretation clause, section 109, "the word parish shall be construed to include any parish, &c., or division or district of a place maintaining its own poor, whether parochial or extra-parochial." Therefore, each parish is only liable to contribute to the common fund of the union for the purpose of the maintenance of its own poor. The 28th section of the 4 & 5 Wm. 4, c. 76, empowers the Poor Law Commissioners to ascertain the expense incurred by each parish of the union for the relief of the poor belonging to such parish, upon an average of three years; and provides that the respective parishes shall contribute and be assessed to the common fund of the union, in the proportions which the expense of such parishes shall be found to have borne to each other during such period. So that, unless a parish has some poor, it is useless to add it to a union. [*Bramcell*, B.—The Commissioners had power to add the parish of Staple Inn to the union, for although at that time there were no poor, there might afterwards be some.] The case of *Rex v. The Poor Law Commissioners* (a) illustrates the principle of construction which ought to be applied to the 4 & 5 Wm. 4, c. 76. Though the 26th section would seem to empower the Commissioners to include in a union a parish which has no poor, yet the general language of that section must read as qualified by the 28th, which shews that the power is only to be exercised where the parish is liable to contribute to the common fund in respect of its own poor. The preamble of the 9th section of the 24 & 25 Vict. c. 55, shews that the object of that enactment was

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not to impose on a parish without any poor the liability to contribute to the common fund of the union, but only to alter the mode in which the contributions then made were calculated: this point was not raised in *Regina v. Boteler*.

Manisty, in reply.—It is not the poor of a parish only who are chargeable upon the common fund of a union, but destitute wayfarers, wanderers, foundlings, persons suffering from accident or sickness and lunatics: 24 & 25 Vict. c. 55, ss. 4, 5, 6. Therefore the parish of Staple Inn, although it has no poor, is liable to contribute to the cost of the relief of all such persons.


POLLOCK, C. B.—In my opinion it is clear that the Poor Law Commissioners had a right to treat Staple Inn as a parish, and add it to the Holborn Union. It is also clear that as one of the parishes of the Union it became liable to contribute to the common fund, under the 28th section of the 4 & 5 Wm. 4, c. 76. But now, instead of contributing in proportion to the expense of each parish on an average of three years, as provided by that enactment, it must, under the 24 & 25 Vict. c. 55, s. 9, contribute in proportion to the annual rateable value of its lands assessable to the relief of the poor, or, in other words, according to its capacity to pay. There is, therefore, a complete answer to the argument, that because Staple Inn has no poor it cannot be called upon to contribute to the common fund of the Union. I think that the order of the justices is not only right in point of law, but is also reasonable according to the common sense view of the subject.

BRAMWELL, B.—I am of the same opinion. I also think the order both right and reasonable. It may seem a hardship on this Society that, not participating in the general

benefits of the poor law in anything like the proportion in which it is rated, it should be charged with this sum of 50*l*. But it is clear that it ought to contribute something to the common fund of the Union, and for this reason, that the Union is subject to the maintenance of paupers frequenting the district, such as wayfarers, wanderers or lunatics.

It is objected that the Commissioners had no power to add this parish to the Union, because the criterion of contributing to the common fund (which it must be supposed that all parishes included in the Union would do) did not exist, since there was no means of ascertaining the annual average expense of the parish for the preceding three years, inasmuch as it had no poor, nor poor rate. But I do not agree with that argument. It seems to me perfectly right and reasonable that a parish which maintains its own poor should be annexed to a Union, although, for many years previously, it may have had no paupers, for a Union is formed because it is convenient with reference to a district, and a parish is not to be omitted because it would derive no immediate benefit from the annexation. I should have thought that a parish was included with reference not merely to its present but its future condition, so that, if it ever had any paupers they might be relieved in the Union of that particular district. Therefore, it seems to me that there is no ground for the objection; on the contrary, I think it would be unreasonable if a parish could not be added to a Union merely because it had no poor and no poor rate. For these reasons I think that the respondents are entitled to our judgment.

CHANNELL, B.—I am of opinion that the decision of the justices is right, and that the respondents are entitled to our judgment. The question submitted to us is, whether, upon the facts stated, the parish of Staple Inn is or is not

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liable to contribute to the common fund of the Holborn Union; and it is admitted that, if liable to contribute, the sum claimed is the proper contribution. It seems to me that, prior to the 20 Vict. c. 19, there was no power to annex Staple Inn to the Holborn Union. The first section of that Act declares that every extra-parochial place shall for the purposes (amongst others) of assessment to the poor rate and relief of the poor, be deemed a parish; and that the justices having jurisdiction over the place may appoint overseers of the poor therein. Staple Inn having thus become a parish, the Poor Law Commissioners had power, under the 32nd section of the 4 & 5 Wm. 4, c. 76, to annex it to the Holborn Union. Therefore all difficulty upon that point is at an end, and, in my opinion, the order of annexation is perfectly good.

Then came the 24 & 25 Vict. c. 55, which altered the mode of calculating the contributions of the several parishes to the common fund of the Union. Instead of the former mode of calculating the expense of each parish upon an average of three years, the 9th section provides that they shall contribute in proportion to the annual rateable value of their lands. If, indeed, the order for contribution had been made before the passing of the 24 & 25 Vict. c. 55, I should have been disposed to agree with the argument of Mr. *Pickering*; but the order was made in May 1862, and after that statute was in force. I therefore think that the order for contribution is also good.

WILDE, B.—I am entirely of the same opinion. If we were to hold that the order to contribute is not good, there would be no means whatever of carrying into effect the provisions of the 20 Vict. c. 19, and 24 & 25 Vict. c. 55. The object of the former Act was to abolish extra-parochial places and to render them parishes for the purposes

of assessment to the poor rates and relief of the poor. Then, being parishes, the Poor Law Commissioners may annex them to a Union, and they are liable to contribute to the common fund of the Union in the manner provided by the 24 & 25 Vict. c. 55, s. 9. The exemption from assessment for the relief of the poor is abolished, and the only mode in which parishes can now contribute is under the 24 & 25 Vict. c. 55, s. 9, in pursuance of which this order was made.

Determination of justices affirmed.

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FREAN v. SARGENT.

June 6.

THIS was an action for slander. The declaration contained three counts, to which the defendant pleaded not guilty, and issues were joined thereon. After notice of trial, the cause was, by agreement in writing, referred to arbitration, "the costs of the cause to abide the event of the award, and the costs of the reference and award to be in the discretion of the arbitrators."

The arbitrators awarded as follows:—"As to the issues firstly and secondly joined in the action, we award and find for the defendant; and as to the issue thirdly joined in the cause, we award and find that the defendant was guilty of the grievances laid to his charge; and we assess the damages of the plaintiff on the occasion thereof at 20s., which sum we direct the defendant to pay to the plaintiff. And we further award and direct that the defendant do pay to the plaintiff his costs of and incidental to this reference and award, and that the defendant do bear his own costs of the same."

An action for slander was, after issue joined, referred by agreement to arbitration, the costs of the cause to abide the event of the award. The arbitrator found for the plaintiff, with 20s. damages. *Held*, that the plaintiff was entitled to costs.

On taxation before the Master, it was objected that as

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the plaintiff had recovered less than 40s. damages he was not entitled to the costs of the action. The Master decided that the plaintiff was entitled, and gave his allocatur for 36*l.* 19*s.* 11*d.*, the plaintiff's costs of the action, and 30*l.* 4*s.* 11*d.* his costs of the reference and award.

The defendant took out a summons at Chambers to review the Master's taxation, which was heard before *Martin*, B., who refused to make an order.

T. W. Saunders now moved for a rule calling on the plaintiff to shew cause why the Master should not review the taxation of the plaintiff's costs.—The plaintiff is not entitled to the costs of the action. In *Wigens v. Cook* (a) and *Griffiths v. Thomas* (b) the question arose under the 3 & 4 Vict. c. 24, and it was held that a plaintiff who recovered less than 40s. damages by the award of an arbitrator, was entitled to the costs of the action, because that statute did not apply, inasmuch as there was no verdict. This, however, is an action for slander, and the question depends on the 21 Jac. 1, c. 16, s. 6, which enacts "that in all actions upon the case for slanderous words, &c., if the jury upon the trial of the issue in such action, or the jury that shall inquire of the damages, do find or assess the damages under 40s., then the plaintiff in such action shall have and recover only so much costs as the damages so given or assessed amount unto, without any further increase of the same." [*Channell*, B.—That enactment only applies where there is a verdict.] Here the cause having been referred by agreement, the arbitrators were substituted for the jury to "inquire of the damages," within the meaning of the 21 Jac. 1, c. 16, s. 6. That enactment is not repealed by the 3 & 4 Vict. c. 24: *Evans v. Rees* (c). The

(a) 6 C. B., N. S. 784.

(b) 4 D. & L. 109.

(c) 9 C. B., N. S. 391.

costs are to abide the event of the award, which means the *legal event*; and in this case the legal event is, that the plaintiff has recovered on one issue 20s. damages. If the cause had been tried and the plaintiff had obtained a verdict for 20s. only, it is clear that he would not have been entitled to costs; and is a defendant to be in a worse situation because he has consented to the damages being assessed by arbitrators instead of a jury?

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MARTIN, B.—We are all of opinion that the Master was right. Where an action is referred to arbitration by agreement, the agreement must determine the rights of the parties. It is a mere matter of contract, and does not depend on the statutes, as is evident from the judgment of the Court of Common Pleas in *Robertson v. Sterne* (a). Here the parties have agreed that the costs of the cause shall abide the event of the award, and that event is in the plaintiff's favour. There will therefore be no rule.

BRAMWELL, B.—I agree that there ought to be no rule. It seems to me a matter of very little difference whether the reference is by order or agreement. My ground for refusing the rule is, that the case is not within any of the statutes which take away the plaintiff's general right to costs which the Statute of Gloucester gives him.

POLLOCK, C. B., and CHANNELL, B., concurred.

Rule refused.

(a) 13 C. B., N. S. 248.

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June 3.

YOUNG, Assignee of MEAYS, a Bankrupt, v. ROEBUCK.

Where a debtor commits an act of bankruptcy after his goods are seized by a sheriff under a *fi. fa.*, the execution is not valid, as against the assignees, unless it has been perfected by sale of the goods before the filing of the petition for adjudication of bankruptcy.

BY consent and order of a judge, in the matter of an interpleader issue, the following case was stated for the opinion of this Court:--

The defendant, T. Roebuck, recovered by the judgment of the Court of Exchequer against J. Meays and S. Townsend 109*l.* 4*s.* 2*d.*, and also recovered by the judgment of the same Court against the said T. Meays 109*l.* 14*s.* 2*d.*, and for having execution of the said judgments writs of *fi. fa.*, tested respectively the 22nd of January, 1863, were issued out of the said Court directed to the sheriff of Yorkshire.

The said sheriff, on the 23rd of January last, seized and took in execution under the said writs certain goods and chattels of the said J. Meays, and advertised a sale thereof by auction to take place on the 30th, but which sale did not take place, being prevented by the circumstances hereinafter mentioned.

The said J. Meays, on the 24th of January last, committed an act of bankruptcy by petitioning the Court of Bankruptcy for the Leeds district (being the district within which he had resided and carried on business for the six months next immediately preceding) for an adjudication of bankruptcy against himself, and by the filing of such petition on the same day was, on the 24th of January, duly adjudged a bankrupt on his own petition; and the messenger of the Court of bankruptcy on the same day came upon the premises where the said goods and chattels were, (and which said goods and chattels had remained and continued in the possession of the said sheriff under and by virtue of the

said writs since the seizure thereof as aforesaid), and claimed possession thereof from the said sheriff; and on the same day the sheriff had notice that the said J. Meays had been so adjudged a bankrupt as aforesaid, the said goods and chattels so seized by the said sheriff then remaining unsold, and the said sheriff being then in possession thereof under the said execution.


The said goods and chattels were not sold by the sheriff; but a further order was made by *Martin, B.*, that the said goods should be delivered up to the said assignee, and that the said assignee should give security to the satisfaction of one of the Masters for payment of the amount of the said judgments to abide the event of this case, and which security has been given accordingly.

The question for the opinion of the Court is, whether under the above circumstances the said assignee under the said bankruptcy was or was not entitled to the said goods and chattels, as against the defendant and the execution at his suit.

Mellish, for the plaintiff.—The plaintiff is entitled to recover. The 184th section of the Bankrupt Law Consolidation Act, 1849, 12 & 13 Vict. c. 106, enacts that no creditor having security for his debt shall receive upon any such security more than a rateable part of such debt except in respect of any execution or extent served and levied by seizure and sale before the filing of a petition for adjudication in bankruptcy. *Hutton v. Cooper* (a) is an express authority that under that enactment an execution is not valid, as against the assignee of a bankrupt, unless not only the seizure but also the *sale* takes place before the filing of the petition for adjudication in bankruptcy. The circumstances of this case are identical with those in *Hutton v. Cooper*.

(a) 6 Exch. 159.

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The 133rd section of the Bankrupt Law Consolidation Act, 1849, only validates executions bonâ fide levied by seizure and sale before the filing of the petition for adjudication in bankruptcy, where the execution creditor has had no notice of any prior act of bankruptcy. In *Edwards v. Scarsbrook* (a), the act of bankruptcy took place between the seizure and sale of the goods, but the petition for adjudication of bankruptcy was not filed until after the sale, so that the title of the execution creditor was complete under the 184th section of the Bankrupt Law Consolidation Act, 1849. It was argued, on behalf of the assignees, that as the execution creditor had notice of the act of bankruptcy before the sale, the execution was invalidated by the 133rd section of that Act; but the Court held that the term "prior act of bankruptcy" in that section meant "act of bankruptcy prior to the execution." [*Wilde, B.*—That decision was right.]

The Court then called on

T. Jones, to support the rule.—The act of bankruptcy having taken place *after* the seizure of the goods, the execution is not invalidated by the 133rd section of the Bankrupt Law Consolidation Act, 1849. The question then is, whether the title of the execution creditor is affected by the 184th section. No doubt, in *Hutton v. Cooper* (b), this Court held that both the seizure and sale must take place before the filing of the petition for adjudication; but according to *Edwards v. Scarsbrook*, where the goods are seized before an act of bankruptcy notice of it will not invalidate the execution. There *Cockburn, C. J.*, after referring to the 6 Geo. 4, c. 18, s. 61, and 2 & 3 Vict. c. 29, said;—"Then the subsequent Act, 12 & 13 Vict. c. 133, introduces a further condition that the issuing of the execution shall be followed by 'seizure and sale'. That still

(a) 8 B. & S. 280.

(b) 6 Exch. 159.

refers to an act of bankruptcy prior to the execution, and leaves the law as to acts of bankruptcy posterior to the execution as it was before." That reasoning would equally apply to the 184th section, and would tend to shew that *Hutton v. Cooper* was not correctly decided.

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Mellish, in reply.—Section 133 renders valid executions, which would otherwise be invalid by reason of a prior act of bankruptcy, if there is both a seizure and sale, provided the execution creditor had no notice of the act of bankruptcy. *Edwards v. Scarsbrook* decided that where the act of bankruptcy intervenes between the seizure and sale that enactment does not apply. Here there was no sale, and therefore the execution is not protected by the 184th section.

POLLOCK, C. B.—We are all of opinion that the plaintiff is entitled to judgment. By the express language of the 184th section of the Bankrupt Law Consolidation Act, 1849, an execution against the goods of a bankrupt is not valid as against his assignees unless it has been levied by seizure *and sale* before the filing of a petition for adjudication of bankruptcy. If there has been a seizure and no sale, the execution creditor is only entitled to a rateable proportion of his debt. In my opinion there cannot be any doubt about it.

BRAMWELL, B.—I am of the same opinion. It is impossible to alter the words of the act of parliament, besides which *Hutton v. Cooper* has already decided the question.

CHANNELL, B.—I am of the same opinion.

WILDE, B.—The case is decided by the express words of the 184th section; and *Hutton v. Cooper* is an authority in point. *Edwards v. Scarsbrook* has no bearing on the ques-

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tion. There the execution had been levied by *seizure and sale* before the filing of the petition for adjudication in bankruptcy, but the act of bankruptcy, of which the creditor had notice, intervened between the seizure and sale, and it was held that the 133rd section did not invalidate the title of the execution creditor, because it referred to an act of bankruptcy prior to the execution, and left untouched the law as to acts of bankruptcy posterior to the execution.

Judgment for the plaintiff.

May 29.

BANBURY v. WHITE and Another.

Where goods are taken in execution within the twenty-one days allowed by the 1st section of the Bills of Sale Act for filing a bill of sale, it is not void as against the persons in the Act mentioned, although the holder of bill of sale, intending to comply with the provisions of the Act, has filed documents not in conformity with it.

It is sufficient if the affidavit filed with the bill of sale refers to the description of the residence and occupation of the attesting witness mentioned in the bill of sale:
Per Pollock, C. B.

INTERPLEADER issue, to try whether certain goods seized in execution by the sheriff of Devon, under a writ of *fi. fa.*, were at the time of the seizure the property of the plaintiff as against the defendants.


At the trial, before *Byles, J.*, at the Devonshire Spring Assizes, 1863, it appeared that the plaintiff claimed the goods in question under a bill of sale given to her by her son, Samuel Banbury. The bill of sale was executed on the 12th and registered on the 15th of November. On the 20th the goods were taken in execution under a writ of *fi. fa.* issued on a judgment obtained by the defendants against Samuel Banbury.

In the bill of sale the attesting witness signed thus:—
“Christopher Bridgman, Solicitor, Tavistock.”

The affidavit filed with the bill of sale was as follows:—

“I, Christopher Vickry Bridgman, of Tavistock, in the county of Devon, make oath and say, that the bill of sale,

a true copy whereof and of the attestation of the execution thereof, and of the schedule thereto annexed, is hereunto annexed, marked A., was duly made and executed by Samuel Banbury, of &c., on &c., in the presence of and duly attested by me, and I further say that the said Samuel Banbury is a yeoman &c., and that I am the attesting witness to the said bill of sale, and that *my residence and occupation hereinbefore set forth is the true description of my residence and occupation.*"


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It was objected, on behalf of the defendant, that the affidavit did not contain a description of the occupation of the attesting witness, as required by the Bills of Sale Act, 17 & 18 Vict. c. 36.

The learned Judge directed a verdict for the plaintiff, reserving leave to the defendant to move to enter the verdict for him.

Kingdon, in the following Term, obtained a rule nisi accordingly; against which

Coleridge and *Lopez* now shewed cause.—First, the 17 & 18 Vict. c. 36, does not require that the description of the residence and occupation of the attesting witness should in terms be stated in the affidavit, but it is sufficient if it can be ascertained by reference in the affidavit to the bill of sale. Section 1 enacts, that "every bill of sale of personal chattels, &c., and every schedule or inventory which shall be thereto annexed or therein referred to, or a true copy thereof, and of every attestation of the execution thereof, shall, together with *an affidavit of the time of such bill of sale being made or given*, and a description of the residence and occupation of the person making or giving the same, &c., and of every attesting witness to such bill of sale, be filed," &c. Therefore the affidavit must state the time when the bill of sale was made or given, and there must appear either

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in it or by reference to the bill of sale a description of the residence and occupation of the person making or giving it, and of every attesting witness to it. In *Routh v. Roublot* (a) it was held that an affidavit was sufficient which, on comparison with the bill of sale, appeared to have been made by the attesting witness to it, although the affidavit did not expressly state that the deponent was the attesting witness. In *Pickard v. Bretz* (b), *Watson*, B., said, "that provided the affidavit shews the occupation by reference to the bill of sale, that would be sufficient." In *Tuton v. Sanoner* (c) the bill of sale contained no description of the residence and occupation of the attesting witness, and in the affidavit he was improperly described.—Secondly, the goods having been taken in execution before the expiration of the twenty-one days allowed for filing the bill of sale, it is valid as against the execution creditor even though the affidavit may be defective: *Marples v. Hartley* (d). The plaintiff might file a sufficient affidavit within the twenty-one days. Moreover registration is only necessary where the goods comprised in the bill of sale are, after the expiration of the twenty-one days, in the possession or apparent possession of the assignor: *Minister v. Price* (e).

Kingdon, in support of the rule (f).—This case is distinguishable from *Marples v. Hartley*, for the plaintiff has elected to register and has filed an insufficient affidavit, so that at the time of the execution she had a defective title. [*Bramwell*, B.—Why should a person who files an insufficient affidavit be in a worse position than a person who does not file one?] If this bill of sale be held valid, a creditor

(a) 28 L. J., Q. B. 240

(b) 5 H. & N. 9.

(c) 3 H. & N. 280.

(d) 30 L. J., Q. B. 92.

(e) 1 F. & F. 686.

(f) He was requested by the Court to confine his argument to the second point.

who seizes after registration, but within the twenty-one days, will be in a worse position than a creditor who delays his execution until after the expiration of that period.

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POLLOCK, C. B.—I am of opinion that the rule ought to be discharged. The case of *Marples v. Hartley* is a distinct authority upon the second point. It was there held that a bill of sale is not invalid by reason of not having been filed, if the effects comprised in it are seized before the expiration of the time within which it might have been filed. There the bill of sale was given on the 27th of June, and a writ of fi. fa. issued under which the sheriff seized on the 5th of July, and it was held that the claimant was not prevented from asserting that the effects were his, although at the time of the seizure the bill of sale had not been filed. I cannot imagine why a bill of sale registered in an imperfect manner should place the claimant in a worse position than if it had not been registered at all.

I must add that in my opinion the answer given to the first point is as conclusive as that given to the second. In *Pickard v. Brets (a)*, where this Court decided that a bill of sale was invalid, because the requisites of the statute had not been complied with in respect of the description of the occupation of the grantor, my late brother *Watson*, who was a remarkably accurate Judge, expressly said that provided the affidavit shewed the occupation by reference to the bill of sale, that would be sufficient. An affidavit annexed to a bill of sale becomes part of it; and here the attesting witness says “my residence and occupation hereinbefore set forth is the true description of my residence and occupation.” That appearing in the bill of sale and no where else, the deponent in effect says “I am the attesting witness

(a) 5 H. & N. 9.

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to the bill of sale, and my residence and occupation are set forth in the bill of sale.

BRAMWELL, B.—I am also of opinion that the rule ought to be discharged. As to the point to which my Lord has last adverted, I say nothing. With respect to the other point, it seems that the case of *Marples v. Hartley* is conclusive. The only ground on which Mr. *Kingdon* can distinguish that case from the present is that here there is a bad registration. Now, assuming that to be so, how can a person be worse off because he intended to do what is required and by some chance failed, than if he had never attempted it? How can a claimant who registers at the commencement of the twenty-one days, but registers imperfectly, be worse off than a claimant who never registers until the last of the twenty-one days? If a sheriff seizes within the twenty-one days, inasmuch as that disables the holder of the bill of sale from taking possession, it seems to me it would prevent the goods being in the possession or apparent possession of the person making the bill of sale. That view is supported by the remark, in *Marples v. Hartley*, of *Wightman, J.*, who said that the interpretation clause does not apply where the officer entered within the twenty-one days and seized the goods upon the premises. I think that case is in point, and I may say that the good sense of the matter is in conformity with that decision (a).

Rule discharged.

(a) *Channell, B.*, and *Wilde, B.*, were not in Court.

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MORTEN and Another v. MARSHALL.

May 27.

DECLARATION.—For that heretofore, to wit, on the 7th November, 1861, the plaintiffs, as and being executors of the last will and testament of J. Lovatt, deceased, in the Court of Exchequer of Pleas at Westminster, by the judgment of the said Court in an action therein, recovered against one W. Turnbull 185*l.* 1*s.* 6*d.*, together with 4*l.* for his costs in that behalf; and thereupon afterwards, to wit, on the 25th of August, 1862, in consideration that the plaintiffs, at the request of the defendant, would stay execution upon the said judgment in the said action against the said W. Turnbull, until the 6th of October then next, the defendant promised the plaintiffs that the amount of 90*l.* 1*s.* 6*d.*, being the balance of debt then due to the plaintiffs and recovered by them under the said judgment, together with the costs of the said action, should be paid to the plaintiffs on or before the said 6th October, and that if not paid to the plaintiffs by the said W. Turnbull, that the defendant would pay the same to the plaintiffs.—Averments: that all things have been done and happened, and all times have elapsed necessary to entitle the plaintiffs to maintain this action: Yet neither the said W. Turnbull nor the defendant have or hath paid the said sum of 90*l.* 1*s.* 6*d.* and costs as aforesaid, or any part thereof.

Plea.—That the said promise was a promise and undertaking in writing made by the defendant to the tenor following:—

“Morten and Another v. Turnbull.

“In consideration of the execution being stayed in this

ences, it being a condition inserted for their benefit, they could not enforce the guarantie against the defendant until they had given him notice of the waiver.

By guarantie in writing, in consideration that the plaintiffs would stay execution upon a judgment against T. until a day named, the defendant undertook that the balance of debt and costs should be paid to the plaintiffs on or before that day, and if not paid by T., the defendant undertook to pay it, and, in consideration of the above undertaking, the plaintiffs agreed to stay execution until that day if the defendant gave Messrs. W. satisfactory references as to his ability to pay the amount, but not otherwise; and if the references were not satisfactory, the guarantie to be given up within a week.—*Held*, that assuming the plaintiffs might waive the stipulation as to satisfactory refer-

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matter until the 6th day of October next, I hereby undertake that the amount of 90*l.* 1*s.* 6*d.*, the balance of debt now due to the plaintiffs, together with costs, shall be paid to the plaintiffs on or before the said 6th day of October; and if not paid by the defendant, I hereby undertake to pay the same; and in consideration of the above undertaking the said plaintiffs agree to stay execution until the said 6th day of October if the undersigned William Marshall give to Messrs. Woodbridge & Sons satisfactory references as to his ability to pay the amount aforesaid, but not otherwise; and if the references are not satisfactory, then this guarantie to be given up within a week from the present date.—Dated this 25th day of August, 1862.

“ William Marshall,

“ For self and co-executor

“ 200, Regent Street.”

“ Henry Morten.”

And the defendant says that the said references in the said promise and undertaking named were not given, and were not satisfactory; and thereupon the defendant requested the plaintiffs to give up the said promise and undertaking, according to the terms of it, which they refused so to do, and the defendant became and was discharged from performing the same.

Demurrer to the plea, and joinder therein.

T. J. Clark, in support of the demurrer.—The stipulation in the guarantie as to satisfactory references is a condition for the benefit of the plaintiffs, and which they may waive without the assent of the defendant: *Markham v. Stanford* (a). Quilibet potest renunciare juri pro se introducto. The plea does not shew that the defendant requested the plaintiffs to give up the guarantie within a week from the date of the agreement; so that if the plea be

(a) 14 C. B., N. S. 376.

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held good the defendant will have obtained the full benefit of the agreement by the execution being stayed against his principal, and nevertheless not be bound by his guarantie. If the first clause of the agreement had stood alone; it would have been obligatory on the plaintiffs to stay the execution until the time named; but then follows a condition introduced for their benefit, and by which they are only bound to stay the execution in the event of satisfactory references being given. Unless the plaintiffs are at liberty to renounce this condition, the defendant by giving unsatisfactory references may render the guarantie worthless. It must be assumed on the face of the plea, either that the defendant gave no references or unsatisfactory references, and that the plaintiffs chose to dispense with them. [*Wilde, R.*—The plaintiff should have replied that the condition was for his benefit, and that he gave notice to the defendant that he renounced it.] If notice of renunciation is necessary, that is included in the general allegation in the declaration, that all things have happened to entitle the plaintiffs to maintain the action.

Folhard, in support of the plea.—The guarantie never took effect, but remained suspended until the defendant should give satisfactory references. The plaintiffs agreed to stay execution if satisfactory references were given, “*but not otherwise.*” Therefore they had no option. The defendant only intended to be bound by the guarantie in case the plaintiffs should be satisfied with his references. Until the plaintiffs gave notice to the defendant that they accepted his references, there was no perfect and conclusive guarantie, but a mere proposition tending to a guarantie: *M'Iver v. Richardson* (a). If the plaintiffs meant to dispense with

(a) 1 M. & Sel. 557.

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the stipulation as to satisfactory references, they should have given notice to the defendants of their intention: *Mozley v. Tinkler* (a).—[He was then stopped by the Court.]

T. J. Clark, in reply.—In *Mozley v. Tinkler* the defendant merely expressed his willingness to guarantie, and named a person to whom the plaintiffs were to apply for his reference; but they never communicated to him their acceptance of it. In this case, the fact of the guarantie not being given up was a sufficient notification to the defendant that the plaintiffs accepted it.

POLLOCK, C. B.—We are all of opinion that the defendant is entitled to judgment.

The case of *Markham v. Stanford* (b) is no authority in favour of the plaintiff. That was an action by the clerk to the trustees of certain turnpike roads against the defendant, as lessee of the tolls, for rent alleged to be due under an agreement of demise, and I directed a verdict for the defendant, because the 3 Geo. 4, c. 126, s. 57, only renders valid agreements for letting tolls when signed by the trustees or commissioners, or their clerk or treasurer, and the lessee *and his sureties*; and in that case the agreement was signed by the clerk to the trustees and the lessee, but not by his sureties. It seemed to me that it never could have been intended that a party should be subject to the liabilities of a lessee unless he had also the rights of a lessee, and the Act expressly directs what is to be done in order to obtain them. I considered that though a person might renounce a stipulation introduced for his own benefit, he could not renounce that which a statute required to be done for the benefit of the public. In this case the plea alleges that the

(a) 1 C. M. & R. 692.

(b) 14 C. B., N. S. 376.

references were not given, and were not satisfactory, and if the plaintiffs meant to dispense with them they should have notified their intention to the defendant.

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BRAMWELL, B.—I am of the same opinion. I have always understood that agreements of this kind should receive a popular construction. Assuming that there was no binding agreement until satisfactory references were given, *Mr. Clark* says that the defendant, by giving unsatisfactory references, or no references at all, might obtain the full benefit of the agreement, while the plaintiffs would get nothing in return. But I am inclined to think that the plaintiffs might have said to the defendant, “We do not accept your references: we do not want them.” It seems to me that the meaning of the agreement is this:—“If we can get no references, there is to be no agreement. If we get references and they are not satisfactory, there is to be no agreement.” But suppose the plaintiffs had said to the defendant:—“Notwithstanding the stipulation as to references, we are willing to dispense with them and run the risk.” I am disposed to think that there would have been a binding guarantie. Assuming, however, that this case falls within the well known principle of law, that a person may renounce the benefit of a stipulation or right introduced entirely in his own favour, the plaintiffs should have given notice to the defendant that they dispensed with the stipulation as to satisfactory references. The case of *Markham v. Stanford* is not inconsistent with our present decision.

WILDE, B.—I am of the same opinion. The question turns upon the construction of a guarantie signed by the defendant, whereby, in consideration of the execution being

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stayed against one Turnbull, the defendant undertook to pay the plaintiffs 90*l.* 1*s.* 6*d.* if Turnbull did not. The guarantie goes on to say, "And in consideration of the above undertaking, the plaintiffs agree to stay execution until the said 6th day of October, if the undersigned W. Marshall give to Messrs. Woodbridge & Son satisfactory references as to his ability to pay the amount aforesaid, but not otherwise; and if the references are not satisfactory, then this guarantie to be given up within a week from the present date." The question is, what is the meaning of that? The plaintiffs agree that the defendant shall stand in the place of Turnbull, if he will give satisfactory references as to his ability to pay the amount, and if he does not, there shall be an end of the guarantie. The defendant cannot tell whether the references are satisfactory to the plaintiffs or not, and that provision was inserted for the purpose of enabling the defendant to know whether he is bound by the guarantie.

It is not necessary to decide whether the plaintiffs might renounce the stipulation as to satisfactory references. I will assume that they might, but if they intended to do so, they should have given notice to the defendant that they waived the benefit of that stipulation. It is said that notice is included in the general allegation in the declaration; but the plea rather shews the contrary, and if notice was really given, it should have been stated by way of replication.

Judgment for the defendant.

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DECLARATION by the plaintiffs, as and being the executrix and executor of John Bush, deceased, against the defendant, as and being the clerk to the Commissioners for putting into execution the provisions of an act of parliament passed, &c. (2 & 3 Vict. c. lxiii.), intituled, "An Act for paving, lighting, watching, and improving the town of Bradford in the county of Wilts: for money payable for the wages or salary of the said John Bush, payable by the said Commissioners, as such, to the said John Bush in his lifetime, as the clerk to the said Commissioners duly nominated and appointed under the provisions of the said Act in that behalf, and upon the retainer of the said Commissioners, as such, and at their request, &c.

Pleas.—First: that the said Commissioners, as such, were never indebted as alleged.

Second.—That the alleged causes of action did not, nor did any or either of them, or any part thereof, accrue within six years before this suit.

Third.—That this action was commenced on the 21st of July, 1862, and that the debts and monies in the declaration mentioned accrued due many years before the commencement thereof, that is to say, part thereof, to wit, 35*l.*, accrued

An attorney who is appointed clerk to Commissioners under a town improvement Act, at a fixed yearly salary, need not deliver a signed bill of costs for business done by him as such clerk.

The Commissioners, under a town improvement Act, being in debt, appointed a finance committee, who made a report to which was appended a schedule of "liabilities" including arrears of salary due to the clerk of the Commissioners more than six years. The Commissioners made an entry in

their minute-book that they accepted the report.—*Held*, no sufficient acknowledgment of the debt to take the case out of the Statute of Limitations.

To an action for salary due from such Commissioners to their clerk, they pleaded that they never had at or since the accruing of the debt funds applicable to the payment of it, and that they had applied all the monies which had come to their hands as such Commissioners, except a small sum set apart by them to satisfy certain other claims which had accrued since that of their clerk, and they never had nor were likely to have any surplus out of which they could pay his claim.—*Held*, on demurrer, that the plea was bad, and that, a debt being due, the plaintiff was entitled to judgment, whether it could be enforced by execution or not.

A plea stating that a debt accrued more than six years ago does not afford any defence, as an informal plea of the Statute of Limitations.

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in and prior to the year 1854, and the residue thereof, to wit, 113*l.* 15*s.*, in and prior to the year 1857: that the said Commissioners had not at the time of the accruing of the said debts and monies, nor have they at any time since had, any funds or monies in hand applicable to the claim of the plaintiffs, and that the said Commissioners have duly collected, as far as it was or is possible to collect the same, all monies and rates which they were or are authorized to levy and collect; and that they have duly applied, disposed of and expended all funds and monies which have ever come to their hands as such Commissioners as aforesaid in and according to the manner provided by the said act of parliament, except a small part thereof, and that the said part of the said monies and funds so remaining in their hands is required by and has, in the bonâ fide exercise by the said Commissioners of their discretion as such Commissioners, been set apart for the purpose of satisfying, according to the said act of parliament, certain just claims upon the said Commissioners which have arisen and accrued long since the accruing of the debts and monies in the declaration mentioned, and are other and different claims than the said debts and monies, and which the said Commissioners are bound under the said Act to pay and satisfy out of such funds and monies as far as the same will extend: that the whole amount of any funds or monies which could be raised, collected, or received by the said Commissioners, as such, by any rate heretofore made, or to be made and levied, or in any other manner whatsoever, would be required by the said Commissioners to meet the said just claims and the interest, current costs, charges and expenses of the years in which the said rate might be made and levied: that the monies which by the said Act the said Commissioners, as such, are empowered to raise, collect, or receive in any one year have not been at any time and will not be more than sufficient to pay and satisfy the aforesaid just claims and

interest and necessary current costs, charges, and expenses of the year, and that there never has yet been, and is not likely to be, any surplus in the hands of the said Commissioners or receivable by them, as such, whereout the said Commissioners, as such, could pay or satisfy the debts and monies in the declaration mentioned.

Fourth.—That this action was commenced after the passing of the act of parliament, passed in the 7th year of the reign of Queen Victoria, for consolidating and amending several of the laws relating to attornies and solicitors practising in England and Wales, and is maintained for the recovery of fees, charges and disbursements for business done by the said John Bush, deceased, as an attorney and solicitor for the said Commissioners, as such; and the plaintiffs did not, nor did the said John Bush, one calendar month before the commencement of this action, deliver to the said Commissioners (being the party to be charged therewith) or send by the post to, or leave for them at their counting house, office of business, dwelling-house, or last known place of abode, any bill of such fees, charges and disbursements subscribed with the proper hand of the plaintiffs, or either of them, or of the said John Bush, deceased, either with their or his name, or with the name or style of any partnership, or enclosed in or accompanied by a letter subscribed in like manner referring to such bill, as required by the said statute.

Issues thereon.—Demurrer to third and fourth pleas, and joinder therein.

At the trial, before *Shee*, Serjt. (a), at the Wiltshire Spring Assizes, 1863, the following facts appeared.—The plaintiffs' testator was an attorney and solicitor; and in the year 1839 had superintended the passing through parliament of the Act for improving the town of Bradford (2 & 3 Vict. c. lxiii.).

(a) Commissioner; *Wilde*, B., being indisposed.

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After that Act passed the testator conducted the business of the Board of Commissioners, but without any fixed salary or remuneration until the year 1851, when it was resolved by the Board that he should be paid a salary of 35*l.* a year. There was no evidence of his formal appointment as clerk. The minute book containing the resolution was lost, but secondary evidence was given of the resolution. Prior to the year 1854, the testator had been paid some monies on account, but none since that time. The writ in this action was specially indorsed as follows:—

" 1857.	To four years' salary as clerk to the	£	s.	d.
July 31.	Commissioners at £35 per annum			
	to this day 140	0	0
Nov. 2.	Three months do. to this day 8	15	0
		<u>£148 15 0."</u>		

A signed bill had been delivered for all the work done before 1851, but not for any subsequently done. The services mentioned in the signed bill comprised attending the meetings of the Commissioners, preparing notices and advertisements, attending petty sessions on summonses for payment of rates, occasionally preparing cases for the opinion of counsel, and investigating titles. It was conceded that the services rendered in 1851 were generally of the same character.

In answer to the plea of the Statute of Limitations, the minutes of the proceedings of the Board of Commissioners were given in evidence. The following entries appeared in the minutes:—

"25 Feb. 1859. Resolved that a sub-committee be appointed for investigating the accounts of the Commissioners, and to make a report of the same."—(The resolution proceeded to appoint three persons as the sub-committee.)

At a meeting of the Commissioners on the 8th of April, 1859, the sub-committee presented their report. Appended to the report was a schedule headed "Liabilities," which

contained the following items:—"Mr. Bush, 20*l.* 16*s.* 11*d.* : Ditto, 110*l.* 16*s.* 8*d.*" Upon the presentation of the report, the following order was entered in the minute-book, and signed by the chairman and five Commissioners (a):—

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"8 April, 1859. Ordered, that the report presented by the finance committee be accepted, and that the thanks of this Board are unanimously given them for the trouble they have taken in the preparation." It was also "ordered that the claim of the executors of Mr. Bush should be referred to the committee of the Board." The Commissioners afterwards made a rate in accordance with the report.

It was objected on behalf of the defendant: first, that the plaintiffs were not entitled to recover, inasmuch as no signed bill had been delivered, as required by the 6 & 7 Vict. c. 73, s. 37: secondly, that at all events the plaintiffs could only recover 70*l.* (the two years' salary due within six years from the commencement of the action), since there was no sufficient acknowledgment to take the residue out of the Statute of Limitations.

A verdict was then entered for the plaintiffs for 148*l.* 15*s.*; and leave was reserved to the defendant to move to enter a nonsuit, or a verdict for him on the ground that no signed bill was delivered; or to reduce the damages to 70*l.*

Collier, in the following Term, obtained a rule nisi accordingly; against which

Kinglake, Serjt., and *Lopez* shewed cause (May 29).—First, it was not necessary to deliver a signed bill, under 6 & 7 Vict. c. 73, s. 37, since the business was done, not as an attorney but in the capacity of a clerk, who was to be paid by a yearly salary. This case is distinguishable from *Philby v. Hazle* (b), where an attorney agreed with his client that he should receive a gross sum and costs out of pocket,

(a) 2 & 3 Vict. c. lxiii. s. 10.

(b) 8 C. B., N. S. 647.

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because there the business was done by the plaintiff in his character of attorney. [*Bramwell*, B.—As the bill did not state the business for which the 50% was claimed, it could not be ascertained whether the charges for costs out of pocket were reasonable. The ground of that decision is, that such an agreement is contrary to the general policy of the law, because it deprives the client of the protection which the statute intended to afford him.] Here the relation of attorney and client did not subsist between the testator and the defendant. In *Smith v. Dimes* (a), *Pollock*, C. B., in delivering the judgment of the Court, said that the 6 & 7 Vict. c. 73, s. 37, does not mean that a signed bill is to be delivered “for every description of business which a person, *being* an attorney or solicitor, does for another, but for such professional business as he is employed to do *as* an attorney or solicitor—that is, by reason of his character as an attorney or solicitor.” The law is stated in similar terms by Lord *Langdale*, M. R., in *Allen v. Aldridge* (b). It was incumbent on the defendants to prove that the claim was in respect of services which could only be performed by an attorney or solicitor.

Secondly, the report of the finance committee and its adoption by the Commissioners was evidence of an acknowledgment of the debt from which a jury might infer a promise to pay it. The Commissioners, through the medium of the finance committee, put themselves in communication with the creditors, and afterwards made a rate, in accordance with the report. It is not necessary that the acknowledgment should be made to the creditor, or his agent, or to any person in particular, but a letter acknowledging the debt addressed to a third party, or a signed acknowledgment in writing not addressed to any one, is sufficient to take the case out of the statute: *Addison on Contracts*, p. 1214, 4th ed.; *Mount-*

(a) 4 Exch. 32. 40.

(b) 5 Beav. 401.

Stephen v. Brooke (a). The 9 Geo. 4, c. 14, never intended to alter the legal effect of an acknowledgment, but only the mode of proving it: *Haydon v. Williams* (b). In *Eicke v. Nokes* (c), Tindal, C. J., ruled that an entry in the examination of a bankrupt of a sum as due to the plaintiff was a sufficient acknowledgment to take the case out of the statute. *Everett v. Robertson* (d), where the debt was inserted in a petition for arrangement with creditors, proceeded on the ground that there was no acknowledgment from which an unconditional promise could be inferred.

C. Bullar (*Collier* with him), in support of the rule.—First, it was necessary to deliver a signed bill. If the 6 & 7 Vict. c. 75, s. 37, be read according to its plain grammatical language, it requires an attorney to deliver a signed bill for every description of work done by him. But according to the construction put upon that enactment in *Smith v. Dimes* (e), it only requires a signed bill where the business is done in the character of attorney. Here there was no evidence that the plaintiffs' testator was employed in any other capacity than an attorney and solicitor. The duties which he performed were those which an attorney only was competent to fulfil. Up to the year 1851, it is clear that he was employed as an attorney, for he delivered a signed bill containing charges for attending petty sessions, preparing cases for counsel, and investigating titles. In 1851, it was agreed that he should be paid a salary, but there was no change in the description of work done by him. In *Allen v. Aldridge* (f), the plaintiff's claim was for work done as steward of a manor, so that the relation of attorney and client did not subsist between him and the defendant.

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(a) 3 B. & Ald. 141.

(b) 7 Bing. 163.

(c) 1 Moo. & R. 359.

(d) 1 E. & E. 16.

(e) 4 Exch. 32.

(f) 5 Beav. 401.

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Secondly, there is no acknowledgment of a debt from which a promise to pay can be inferred, and therefore the question whether an acknowledgment to a third person is sufficient does not arise. All that the Commissioners have done is to adopt a report drawn up by the finance committee. By the 2 & 3 Vict. c. lxiii., s. 10, the Commissioners can do no act except at a meeting, and therefore they can only be bound as a body. But there was no acknowledgment of this debt by them at a meeting; all that they did had reference to the report alone.

POLLOCK, C. B.—We are all of opinion that the rule ought to be absolute to reduce the damages to 70%.

Two objections were taken at the trial: first, that no signed bill had been delivered, as required by the 6 & 7 Vict. c. 73, s. 37: secondly, that there was no sufficient acknowledgment to prevent a part of the claim being barred by the Statute of Limitations.

The first point seems to me clear. The salary sought to be recovered is for work done, not in the capacity of an attorney, but as a clerk. Certainly it is not necessary that the person who holds the office should be an attorney, and much of the business, such as making out accounts, attending meetings of the Commissioners, &c., might be done by any other person than an attorney. This is simply a claim for salary, and nothing more; therefore it was not necessary to deliver a signed bill. It is the common practice for public Boards to employ an attorney at a fixed salary. He transacts all the business of the Board, and makes disbursements, but charges nothing beyond his salary. Therefore the objection that a signed bill ought to have been delivered cannot be sustained.

With respect to the second point, I cannot see that anything has been done by the Commissioners which amounts

to an acknowledgment of the debt, so as to prevent the operation of the Statute of Limitations. The Commissioners appointed a finance committee to investigate their accounts and report thereon. The committee made a report which contained a schedule of "liabilities;" but there is no evidence that the Commissioners so far adopted the report as to communicate with any one of the persons mentioned in the schedule, and admit that his claim was well-founded and that they would pay it. The case of *Emery v. Day* (a) goes far to shew that what was done did not amount to such an acknowledgment. The utmost that can be said is, that the adoption of the report was a matter from which a reasonable person might infer that a debt was due from the Commissioners to the plaintiffs' testator, which, perhaps, they ought to have satisfied; but there is nothing to constitute an acknowledgment from which a promise to pay can be inferred so as to take the case out of the statute. I therefore think that the rule ought to be absolute to reduce the damages to 70%.

BRAMWELL, B.—I am of the same opinion. The argument for the defendant is, that at one time the plaintiffs' testator was not employed at a salary, and at that time he delivered a bill for work done by him as an attorney, such as attending petty sessions, preparing cases for opinion of counsel, and investigating titles, which would clearly be within the meaning of the 6 & 7 Vict. c. 73, s. 37. It is then said that, although he was afterwards to be paid by a salary, yet, as the work continued the same, the payment by a salary did not diminish the obligation to deliver a signed bill. But I think that makes all the difference; for so long as he was employed, not at a salary, but to be paid for what he did, he was employed as an attorney, not retained for any particular time, and might have been discharged at a

(a) 1 U. M. & R. 245.

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moment's notice. But when he was employed at a yearly salary, although the description of work was the same, he was not, to my mind, employed as an attorney. The argument for the defendant may be thus answered: suppose a person who was not an attorney had for some time done the work, and was then succeeded by the plaintiffs' testator, could it be said that the latter was bound to deliver a signed bill because he happened to be an attorney? Certainly not. It seems to me that the plaintiffs' testator was bound to deliver a signed bill so long as he acted as an attorney and charged as an attorney; but as soon as it was agreed that he should be paid by a fixed salary, he was no longer bound to do so.

I do not dissent from anything decided in *Smith v. Dimes* (a), for I consider that we are bound by that decision; but in that case the work was done as an attorney, here it was done as a clerk, and might have been done by a person not an attorney. The plaintiffs' testator did not attend before the magistrates in his professional character as an attorney, but as clerk to the Commissioners. They were entitled to appear personally, or by their clerk. For these reasons I think that the rule for a nonsuit or to enter the verdict for the defendant ought to be discharged.

As to the second point, I am of opinion that there was no sufficient acknowledgment to take the case out of the Statute of Limitations. Assuming that a written acknowledgment of a debt may be addressed to a third person or to no one in particular, yet it must be signed by the party chargeable. Here the resolution adopting the report was signed by the chairman and five Commissioners (b), but it was not signed by them as persons chargeable with the debt, or as an acknowledgment binding the body of Commissioners. But then it is said that the report was accepted. That might afford some evidence of a debt due from the defendant to the plaintiffs'

(a) 4 Exch. 32.

(b) 2 & 3 Vict. c. lxiii., s. 10.

testator, on the ground that a man's conduct and demeanour, as well as a statement made to and not denied by him, are evidence against him. But that is very different from such an acknowledgment of a debt as amounts to a promise to pay it. The Commissioners, in accepting the report, may only have intended to say, "there may be such a debt, but what we have to do now is to accept the report; if there is any objection to it, that may be discussed at some future time." It is clear therefore that there was no acknowledgment under the statute, and the rule must be absolute to reduce the damages.

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Rule discharged, the plaintiffs consenting to reduce the damages to 70*l*.

The demurrers were argued in the following Michaelmas Term (Nov. 11), by

Lopez (with whom was *Kinglake*, Serjt.), for the plaintiffs.—The third plea affords no answer to the action. It admits the debt, and merely alleges that the Commissioners have not, nor are likely to have, any money with which they can pay it. But that is no reason why the plaintiffs should not recover judgment for their debt. In *Pallister v. The Mayor, &c., of Gravesend* (a) it was held that the obligee of a bond given by a corporation was entitled to judgment in an action upon it, although there might be some difficulty in obtaining satisfaction of the judgment. *Payne v. The Mayor, &c., of Brecon* (b) and *Lewis v. The Mayor, &c., of Rochester* (c) are also authorities that the plaintiffs are entitled to judgment. Besides, the plea does not negative the fact of the Commissioners

(a) 9 C. B. 774.

(b) 3 H. & N. 572.

(c) 9 C. B., N. S. 401.

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having other property than the money raised by the rates. The plaintiffs do not ask for a retrospective rate (although no rule of law prohibits it: *Harrison v. Stickney* (a)); but merely for judgment for their debt.—The point raised by the demurrer to the fourth plea has been decided by the judgment of the Court upon the rule to enter a verdict for the defendant or a nonsuit.

The Solicitor General (b) (*C. Bullar* with him), for the defendant.—The first point raised by the plea involves the question whether the declaration is good. The plaintiffs cannot recover in this action without shewing that there are funds which, by the 2 & 3 Vict. c. lxiii., the Commissioners may apply in payment of this debt. The 13th section enables the Commissioners to appoint a clerk, treasurer, collector of rates, and such other officer for the execution of the Act as they shall think proper; and “shall and may out of the monies which shall arise and be collected by virtue of this Act allow and pay to such officer such salaries or allowances as the said Commissioners shall think reasonable.” No bond was here given as in the cases cited; and the Commissioners are not a corporation, which is an answer to the argument that they may have other property besides the monies arising from the rates. The Commissioners appointed a clerk, and their contract was to pay him out of the monies raised by virtue of the Act. The obligation to pay does not arise until the Commissioners have funds, and therefore the declaration should have contained an averment that the Commissioners had sufficient money in their hands: *Andrews v. Dally* (c). In *Tilson v. The Town of Warwick Gaslight Company* (d), the declaration did contain an averment to that effect. [*Bramicell*, B.—There the action was against a corporation who had not made the contract.] If the

(a) 2 H. L. 108.

(c) 4 Bing. 566.

(b) Sir R. Collier: see post, p. 428.

(d) 4 B. & C. 962.

Commissioners have failed in their duty, the remedy is by action on the case: *Cane v. Chapman* (a); but no form of action is maintainable without an averment in the declaration that the Commissioners have funds. No contract which created a debt arose from the mere appointment of the plaintiffs' testator to the office of clerk: *Bogg v. Pearse* (b). It may be that the Commissioners are personally liable, but here they are sued, as Commissioners, in the name of their clerk.

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Secondly, the Commissioners have no power to make a retrospective rate. The plaintiffs' testator had distinct notice that the rates were to be levied annually. The 12th section of the 2 & 3 Vict. c. lxiii. requires the Commissioners "to cause an annual account in abstract to be prepared, shewing the total receipts and expenditure of all funds levied under or by virtue of this Act for every year," &c., and to "transmit a copy of the said account, to the clerk of the peace for the county of Wilts, on or before the 1st day of January in each year, which account shall be open to the inspection of the public," &c. The 94th section directs in what manner the monies raised under the Act shall be applied. The present Commissioners cannot tell whether this claim is just. In *Woods v. Reed* (c), Lord Abinger said:—"The general inconvenience of retrospective rates has been long known and recognized in the Courts of law, on the ground that succeeding inhabitants cannot legitimately be made to pay for services of which their predecessors have had the whole benefit." In *Harrison v. Stickney* (d) the question arose under a drainage Act, which contained no prohibition against a retrospective rate. That decision does not apply, because here the Commissioners are required to make annual rates and exhibit annual accounts.

(a) 5 A. & A. 647.

(b) 10 C. B. 534.

(c) 2 M. & W. 777. 784.

(d) 2 H. L. 108.

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The fourth plea is good. It is admitted by the demurrer that the work was done by the plaintiffs' testator as an attorney, and that no signed bill has been delivered.

Lopez, in reply.—If the declaration was defective for want of an averment that the Commissioners have funds, the defect is cured by the third plea, which shews that some monies remain in their hands. It is consistent also with every allegation in that plea that they have landed property, for the 80th section of the 2 & 3 Vict. c. lxiii. empowers them to contract “for the absolute purchase of any messuages, buildings, tenements, lands, grounds, hereditaments and premises within the said town which the said Commissioners shall deem desirable and proper to purchase for the general improvement of the said town, or *for other the purposes of this Act.*” The question as to a retrospective rate is not open upon these pleadings. But the cases shew that such a rate is only valid when it is not expressly or impliedly prohibited.—The fourth plea is bad. The declaration is for salary payable to the plaintiffs' testator as clerk to the Commissioners; and it is no answer to say that he was an attorney.

POLLOCK, C. B.—We are all of opinion that the plaintiffs are entitled to judgment. They, in effect, say that the Commissioners have had services for which they ought to pay. The Commissioners do not deny that, but only say that they have no means of paying. But I confess I do not see why they should not have made a rate for the payment of this debt as well as others. Again the plaintiffs say that at all events they are entitled to judgment, and if the Commissioners cannot now pay they may at a future time. This seems to me the result of the case, and I am of opinion that the third plea affords no answer to the action.

BRAMWELL, B.—I am of the same opinion. If the third plea really stated what the defendant supposes it to state, it would afford no answer to the action. The plea is in effect this: “You ought not to be allowed to maintain this action, because if you recovered judgment you would not obtain satisfaction, for we have not, nor ever shall have, the means of paying you.”

It is argued, on behalf of the defendant, first, that the declaration is bad in itself, because the 2 & 3 Vict. c. lxiii. s. 13, says that the clerk is to be paid out of the monies collected by virtue of that Act, and the declaration contains no averment that the Commissioners have any monies in their hands; secondly, that the declaration, if not bad in itself, is shewn to be bad by the allegations in the plea that the Commissioners have not, nor ever will have, any funds applicable to the payment of this debt. But I think that the 13th section may be read as simply authorizing the Commissioners to pay their clerk, for they have no funds except those arising from the rates. The case of *Bogg v. Pearse* (a) is distinguishable. That was an action by a street-keeper against two of the Commissioners (b), under a local paving Act, for arrears of salary, and the decision proceeded on the ground that the mere exercise of the power conferred on the Commissioners to appoint a street-keeper did not create a contract to pay his salary.

Then it is said that the Commissioners have no power to make a retrospective rate. I think that the cases of *Pallister v. The Mayor of Gravesend* (c) and *Payne v. The Mayor of Brecon* (d) shew that this consideration does not furnish the subject-matter of a bar to the action. If a debt is due, judgment must be recovered, and whether execution can effectually issue or not is a matter to be afterwards determined.

(a) 10 C. B. 534.

(c) 9 C. B. 774.

(b) See 8 & 9 Vict. c. clxvii. ss. 38, 39.

(d) 3 H. & N. 572.

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But the third plea is really not what the defendant supposes. It alleges that the Commissioners had not at the time of the accruing of the debts, nor have they at any time since, had any funds applicable to the payment of the plaintiffs' claim: that they have duly collected all rates which they were authorized to collect, and duly applied all monies which ever came to their hands in manner provided by the Act, except a small part thereof which they have set apart to satisfy certain claims which have arisen since the accruing of the plaintiffs' claim. But the plaintiffs may well answer: "You ought to have levied a rate, or, at all events, given us the small sum which you admit that you have in your hands, and which is applicable to our claim." That disposes of the point that the Commissioners never had any funds with which they could pay the plaintiffs' claim. The plea seems very like this: "We are not bound to pay the plaintiffs, because we have determined to apply the funds in our hands in payment of some other claim which has arisen since the plaintiffs'." But it is not to be supposed that they can evade payment of the debt by such a plea. All that we now decide is that so far as it appears by the record the plaintiffs are entitled to judgment.

CHANNELL, B.—I am also of opinion that the plaintiffs are entitled to judgment. The important questions raised upon the record are, first, whether the declaration is bad for want of an averment that the Commissioners had funds with which they could pay the plaintiffs' claim; and secondly, whether, if the declaration is good, the third plea affords an answer to it. I think the declaration is good. Then the plea can only be an answer provided it shews that the Commissioners never had any funds with which they could lawfully pay the plaintiffs' claim. But the plea does not amount to that. It admits that the Commissioners have in hand a small sum of money, which they have elected to appropriate in payment

of some other debts which have accrued since the plaintiffs'. It seems to me that the averment at the end of the plea, that the Commissioners have never had nor are likely to have any surplus in their hands with which they could pay the plaintiffs' claim, does not assist them; because the plaintiffs are entitled to recover the amount in hand, without shewing that enough might be collected to satisfy the whole of their demand. The case, therefore, rests on the previous allegations in the plea, and in my opinion they fail to afford any defence to the action. I therefore think that the plaintiffs are entitled to judgment; and I agree that we are not now deciding whether it can be satisfied by execution.

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PICOTT, B. (a).—I am of the same opinion. I think the declaration good, and I am at a loss to see what answer the third plea affords to it. The plea says, that the Commissioners never had nor are likely to have any money with which they can pay the plaintiffs' claim. But why not? The act of parliament authorizes them to appoint a clerk and pay him, and has pointed out the fund with which he is to be paid. It is no answer to say, "It is true we have appointed a clerk and have had his services, but we have no money with which to pay him." It seems to me that is only acknowledging a defect of duty on their part, and although they hint at laches on the part of the clerk, the plea is not founded on that. Assuming, however, that he never made any claim, the mere fact of the salary not having been demanded would be no answer, unless the plea proceeded to shew that the Commissioners made up and balanced their accounts from year to year, and transmitted a copy of them to the clerk of the peace as required by the legislature. I do not say that a good plea might not be

(a) See *post*, p. 428.

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PIGOTT, B. (a).—I am of the same opinion. I think the declaration good, and I am at a loss to see what answer the third plea affords to it. The plea says, that the Commissioners never had nor are likely to have any money with which they can pay the plaintiffs' claim. But why not? The act of parliament authorizes them to appoint a clerk and pay him, and has pointed out the fund with which he is to be paid. It is no answer to say, "It is true we have appointed a clerk and have had his services, but we have no money with which to pay him." It seems to me that is only acknowledging a defect of duty on their part, and although they hint at laches on the part of the clerk, the plea is not founded on that. Assuming, however, that he never made any claim, the mere fact of the salary not having been demanded would be no answer, unless the plea proceeded to shew that the Commissioners made up and balanced their accounts from year to year, and transmitted a copy of them to the clerk of the peace as required by the legislature. I do not say that a good plea might not be

(a) See *post*, p. 428.

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framed, but the plea in its present form is clearly no answer, and the plaintiffs are entitled to judgment.

Judgment for plaintiffs on demurrer to the third plea; the plaintiffs withdrawing the demurrer to the fourth plea, upon payment of costs.

There was another action between the same parties, in which the plaintiffs sued as executors for the amount of a bill of costs for business done by their testator as an attorney and solicitor. The pleas in this action were the same as those in the other, except that the third plea stated that the action was commenced on the 22nd of August, 1862, and that part of the debts, "to wit, 5*l.* 19*s.* 8*d.*, accrued in and prior to the year 1841, and the residue thereof, to wit, 260*l.* 13*s.* 6*d.*, in and prior to the year 1850." The plaintiffs demurred to this plea only, and one of the points for argument was, "that the plea also affords an answer to the declaration, under the Statute of Limitations (21 Jac. 1, c. 16, s. 3), no part of the debt having accrued due within six years before the commencement of this action." It was admitted by the defendants' counsel, that in all other respects the two cases were similar.

Cur. adv. vult.

On the following day (Nov. 12th),

POLLOCK, C. B., said.—It was suggested that there was a difference between this and the case already decided, inasmuch as the third plea in this case affords a defence under the Statute of Limitations. That defence may arise either from the debt having originally accrued more than six years before the commencement of the action, or, having

been revived by part payment or acknowledgment in writing, such revival may have occurred more than six years before the commencement of the action. Now, the allegation in this plea is, not that the *cause of action* did not accrue within six years before suit, which is the usual form, but that part of the debts accrued in and prior to the year 1841 and the residue in and prior to the year 1850. Now, to say that the debts accrued more than six years ago may be perfectly true, and yet an action may be maintainable, for part payment would take the case out of the statute, or an acknowledgment in writing would revive the liability. We think, therefore, that there is no substantial difference between this case and the other, and that the plaintiffs are entitled to judgment on the demurrer to this plea.

BRAMWELL, B., said.—It is admitted on the part of the defendant that the other case governs this with one exception, that here it appears affirmatively that no portion of the debts was less than twelve years old, and the objection was raised that the plea amounted to an informal plea of the Statute of Limitations. I am of opinion it does not, because it merely says that the *debts*, not the *cause of action*, accrued more than twelve years ago. Now, as regards the Statute of Limitations, a debt may accrue twice over, that is to say, at the time of the original promise, and at the time of a revival of the debt by part payment or acknowledgment in writing. That is manifest from the usual replication to a plea of the statute. Therefore, it is not enough for the plea to state that the *debts* accrued more than six years before the commencement of the action, but it ought to state that the *cause of action* did not accrue within that time. It seems to me that there is no difference between this and the case already decided, and the plaintiffs are entitled to judgment.

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CHANNELL, B., said.—This case is governed by the other, unless the distinction which is attempted to be made exists. I am of opinion that the plea does not amount to an informal plea of the Statute of Limitations, and that the plaintiffs are entitled to judgment.

PIGOTT, B.—I am also of opinion that the plea cannot be sustained as an informal plea of the Statute of Limitations.

Judgment for the plaintiffs.

June 12


LA BANCA NAZIONALE SEDE DI TORINO v. HAMBURGER.

Where a foreign bank sued in a corporate name by which it was known, and the defendant pleaded that it was not a body corporate, the Court allowed the writ, declaration, and subsequent proceedings to be amended by inserting the name of a director of the bank as nominal plaintiff, it appearing that by the law of the country the bank was entitled to sue in his name.

THE plaintiffs were described in the writ of summons as “La Banca Nazionale sede di Torino;” and they sued upon bills of exchange indorsed by the defendant to one Ludovico Laurent, who indorsed them to the Central Administration of “La Banca Nazionale,” by whom they were indorsed to the plaintiffs. The defendant pleaded “that the plaintiffs, at the time of the commencement of the suit, were not a body corporate, nor entitled to sue in this country by the said name and style.”

L. Kelly had obtained a rule calling on the defendant to shew cause why the plaintiffs should not be at liberty to amend the writ, declaration and subsequent proceedings, by inserting the name of Augustin Mottura, a director of the Turin branch, as the nominal plaintiff on behalf of the Turin “sede” or branch of the said bank: or by describing the plaintiffs as represented by the said Augustin Mottura, the director of the said branch, and by making the necessary alterations accordingly.

The affidavit of the plaintiffs' attorney, in support of the application, stated that he was informed that the said bank is, or is in the nature of a body corporate, having authority from the law of Italy, where it is domiciled and its business is carried on, to sue in Italy or elsewhere in several names or firms, and amongst others, first, in the name of the director of the particular branch (*sede*) to which the money claimed is payable; secondly, in the name of the particular branch of the National Bank represented by the director of such branch: that at the time of issuing the writ and of declaring thereon deponent was not aware that it was considered proper that the name of the director should appear on the face of the proceedings, but he has since learned that it is advisable that it should appear.

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Watkin Williams now shewed cause.—The Court has no power to make the amendment. This is in effect an application to substitute a new plaintiff, and the Court has no authority to grant it. Where a husband was sued for a debt contracted by his wife before marriage, the Court of Common Pleas held that it was not competent for the Judge at the trial to amend the record by making the wife a party to it: *Garrard v. Guibilei* (a). [*Martin*, B.—A new defendant cannot be added without notice, for he has a right to have a writ served upon him; but how does that apply to a plaintiff?] If the application be granted there would be a new writ with which the defendant has never been served. [*Pollock*, C. B.—Some corporations are entitled to sue in their corporate name, others in the name of a particular officer. Now, suppose a corporation sued in its corporate name when it ought to have sued in the name of an officer, why should not the writ be amended? It is not adding a new plaintiff, but correcting a mere mistake in the name.]

(a) 11 C. B., N. S. 616.

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The case is not within the 34th and subsequent sections of the Common Law Procedure Act, 1852, as to the joinder of parties to actions; and the 222nd section was never intended to authorize an amendment of this kind. [*Channell, B.*, referred to *Blake v. Done (a)*.] That was an action of ejectment, and the two trustees whose names were added were present in Court and consented.

L. Kelly appeared in support of the rule, but was not called upon to argue. He referred to *Coombe v. The Bristol and Exeter Railway Company (b)*.

Per CURLIAM (c).—The rule must be absolute on payment of costs.

Rule absolute accordingly.

(a) 7 H. & N. 465.

(b) 1 F. & F. 206.

(c) *Pollock, C. B., Martin, B., and Channell, B.*

June 5,

COOKE v. WARING.

The defendant's sheep, being diseased, got into the plaintiff's field where his sheep were grazing, and infected them with the disease. It did not appear how they got there. The defendant, on being told of it, used

expressions indicating knowledge that his sheep were diseased. In an action against him for suffering his sheep to go at large:—*Held* that, in the absence of negligence, proof of a scienter was necessary, and there was no sufficient evidence of it.

DECLARATION.—For that the defendant wrongfully, negligently, and improperly kept certain sheep diseased with the scab, and dangerous to be suffered to go at large, he, the defendant, during all that time well knowing that the said sheep were so diseased with the scab and dangerous to be at large; whereby and by reason of the wrongful, negligent, and improper conduct of the defendant in that behalf, the said sheep of the defendant intermixed with certain sheep of the plaintiff in a sound and healthy condition of body,

and the said healthy sheep of the plaintiff became diseased and infected by the said diseased sheep of the defendant, and many of the sheep of the plaintiff died from the said disease, and were wholly lost to the plaintiff, and the residue of the said sheep became and were diseased and rendered of little value to the plaintiff.

Plea: Not guilty.

At the trial, before *Channell*, B., at the Shropshire Spring Assizes, 1863, the following facts appeared:—In the Summer of 1860, the plaintiff, who was a farmer, had some sheep in a field on his farm. Adjoining one corner of this field was a field of a farm occupied by the defendant. A day or two before the alleged injury the defendant had fetched some sheep from a distance and placed them in this field. The plaintiff being about to sell some of his sheep, they were removed to a barn for inspection by the intended purchaser, when it was discovered that they all had the “scab.” Some sheep of the defendant having that disease had been previously found in the plaintiff’s field mixed with his sheep, and the plaintiff’s shepherd separated them. Information was sent to the defendant, but he took no notice of it; and his sheep, after being kept for some time, were turned out into the road. There was no direct proof of the mode in which the defendant’s sheep got into the plaintiff’s field. There was evidence that the fence between the plaintiff’s and the defendant’s field belonged to the defendant, and that it was in proper repair. There was, however, a lane leading from the defendant’s field, and the hedge which separated it from the plaintiff’s field was one which sheep might get over. About four days after the defendant’s sheep were found in the plaintiff’s field, the defendant said to a person who told him that his sheep had the “scab,” “I could not help it: I had the sheep at tack at Mr. Parson’s of Tugford, and they caught it from Mr. Brindley’s, at

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Broomscoft, sheep." The defendant subsequently made a similar statement to the plaintiff. Evidence was given of the communication of the disease by touch, for the purpose of negating the idea that the plaintiff's sheep might have caught the disease from other sheep than the defendant's.

It was submitted on behalf of defendant: first, that there was no evidence that the defendant knew that his sheep had the "scab:" secondly, that there was no proof of negligence. The learned Judge was of that opinion and nonsuited the plaintiff.

Huddleston, in the following Term, obtained a rule nisi for a new trial, on the ground that the learned Judge wrongly determined that there was no evidence to go to the jury of scienter or negligence, and that negligence was necessary to be proved as well as knowledge; against which

Pigott, Serjt., *H. Matthews* and *Gough* shewed cause (a). (May 28, June 2. 4.)—The ruling of the learned Judge was correct. In actions of tort it is not sufficient to allege that an injury accrued to the plaintiff from some act of the defendant, but it must be averred and proved that the act was wrongful. Here there was no evidence of negligence. Consistently with the facts proved, the sheep may have escaped through the tortious act of a third party, or a defect of fences which the plaintiff was bound to repair. "Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do:" per *Alderson*, B., *Blyth v. The Birmingham Waterworks Company* (b). Without negligence this action is not

(a) Before *Pollock*, C. B., *Bramwell*, B., and *Channell*, B.

(b) 11 Exch. 784.

maintainable: *Withers v. The North Kent Railway Company* (a). In *Hill v. Balls* (b), a count for knowingly selling a glandered horse by public auction, which infected the horses of the plaintiff, who purchased it believing it sound, was held bad on demurrer. If the allegation of negligence be struck out of the declaration no wrongful act is shewn. In the case of ferocious animals, the keeping them is the wrongful act, and therefore negligence need not be alleged or proved: *Card v. Case* (c); *May v. Burdett* (d); *Jackson v. Smithson* (e); *Smith v. Pelah* (f); Rast. Ent. 616. But here there is *damnum* without *injuria*: *Vaughan v. The Taff Vale Railway Company* (g). [Bramwell, B.—There is nothing illegal in keeping a mischievous or a diseased animal, provided it is kept safely. In *May v. Burdett* (d) the Court said:—"But the conclusion to be drawn from an examination of all the authorities appears to us to be this: that a person keeping a mischievous animal with knowledge of its propensities is bound to keep it secure *at his peril*, and that, if it does mischief, negligence is presumed, without express averment." May it not be said that an animal having an infectious disease is a "mischievous" animal? Perhaps it is not correct to say of a scabby sheep that it has a "propensity" to communicate disease, but it has a "tendency" to communicate it. Is there any distinction in principle between the liability for acts of a mischievous animal and a diseased animal?] The propensity, to which the law attaches a liability so extraordinary, must be innate and habitual. The tendency to communicate disease may be, and here probably is, of a temporary character. At all events unless a *scienter* be alleged and proved, which is not done here, evidence of negligence is necessary. [Chan-

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(a) 27 L. J. N. S., Exch. 417.

(b) 2 H. & N. 299.

(c) 5 C. B. 622.

(d) 9 Q. B. 101.

(e) 15 M. & W. 563.

(f) 2 Stra. 1264.

(g) 3 H. & N. 743; in error,
5 H. & N. 679.

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nell, B.—Suppose a vicious horse trespassing on the plaintiff's land and eating his grass, kicked him, would it be necessary to allege a scienter?] An action might be maintained in respect of the trespass, and the injury caused by the kick would form the subject of consequential damage. In *Cox v. Burbidge* (a), the defendant's horse, being on a highway, kicked the plaintiff, a child, who was playing there; and it was held that to entitle the plaintiff to recover there must be some affirmative proof of negligence in the defendant in respect of a duty owing to the plaintiff. *Erle*, J., there said:—"As between the owner of the horse and the owner of the soil of the highway or of the herbage growing thereon, we may assume that the horse was trespassing; and if the horse had done any damage to the soil, the owner of the soil might have had a right of action against his owner." But where there is no trespass as against the party injured by an animal, there must be proof of a scienter or negligence on the part of the owner. It may be admitted that trespass might have been maintained here, but that form of action has not been adopted. *Anderson v. Buckton* (b) was an action of *trespass* for the entry of diseased cattle into the plaintiff's close, and it was alleged as *consequential damage* that the plaintiff's cattle were infected. [*Channell*, B., referred to *Singleton v. Williamson* (c).] As regards the scienter there was at most a mere scintilla of evidence. The facts proved are equivocal, and do not establish the defendant's knowledge prior to the occurrence of the mischief: *Thomas v. Morgan* (d); *Doe d. Welsh v. Langfield* (e). It cannot be presumed that the defendant had such knowledge from the circumstance that he was not called to rebut the inference of a scienter, since the plaintiff ought to make out his case by affirmative proof.

(a) 13 C. B., N. S. 430.

(b) 1 Stra. 192.

(c) 7 H. & N. 410.

(d) 2 C. M. & R. 496.

(e) 16 M. & W. 497.

Huddleston and *Harrington*, in support of the rule.—First, the fair *prima facie* presumption from the evidence is, that the defendant was cognizant of the condition of his sheep, before the mischief occurred. In *Hudson v. Roberts* (a) the plaintiff having been injured by the defendant's bull, the defendant stated, *after* the accident, that the red handkerchief caused the mischief, for he knew the bull would run at anything red, and this was held to be evidence of a *scienter* *before* the accident. [*Channell*, B.—The statement there made was evidence that the defendant had a knowledge of the *habit* of the animal.] Here it was in the power of the defendant to rebut the presumption of previous knowledge, if it were not correct. It is matter of common knowledge that such a disease is dangerous.—Secondly, assuming there was evidence of the *scienter*, it was unnecessary to aver or prove negligence. The case of *Hill v. Balls* (b) has been relied on by the defendant. But there the purchase of the glandered horse by the plaintiff was a voluntary act, and the rule of *caveat emptor* was applicable. In *Anderson v. Buckton* (c) the decision of the Court proceeded upon the ground that what was there laid as consequential damage might have formed the subject of a distinct action on the case. The authorities which have been referred to, and which establish the proposition that in the case of mischievous animals negligence will be presumed where a *scienter* is shewn, apply equally to diseased animals. The injury results in each case from physical agency, though with different effects. *Vaughan v. The Taff Vale Railway Company* (d) is distinguishable, since in that case the ground of the decision of the Court of error was, that the legislature had *legalized* the act which caused the damage. Here, even if the act which caused the damage was *excusable*, it was for the defendant to shew the matter of excuse. In

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(a) 6 Exch. 697.

(b) 2 H. & N. 299.

(c) 1 Stra. 192.

(d) 5 H. & N. 679.

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Re v. *Vantandillo* (a) an indictment for unlawfully and injuriously carrying a child infected with the small pox along a public highway, without averring negligence, was held good upon motion in arrest of judgment.—Lastly, there was sufficient proof of negligence within the definition given by *Alderson*, B., in *Blyth v. The Birmingham Waterworks Company* (b), assuming such proof to be necessary.

Cur. adv. vult.

POLLOCK, C. B., now said.—We are all of opinion that the rule to set aside the nonsuit and for a new trial ought to be discharged.

It seems to us that there was no evidence of a scienter which called upon my brother *Channell*, who tried the cause, to leave any question to the jury. There was some evidence that the defendant was aware of the condition of the sheep after the mischief was done; but there was no evidence that he was aware of it before; so that a conclusion might be drawn either one way or the other. Evidence which does not tend to prove the matter in issue, and consistently with which the jury might find either one way or the other, ought not to be submitted to them. The issue should be disposed of by evidence, not by surmise or suspicion.

I am therefore of opinion that, a scienter being essential to support the action, and there being no evidence of it, my brother *Channell* was perfectly right in nonsuiting the plaintiff.

BRAMWELL, B.—I am of the same opinion. The ruling was correct, because there was no negligence if there was no knowledge upon the part of the defendant. It is, no doubt, extremely difficult to separate the two considerations of knowledge and negligence, and say that either of them

(a) 4 M. & Sel. 73.

(b) 11 Exch. 784.

would be sufficient without the other. But I think it enough to say there was no evidence that, at the time when the injury occurred, the defendant knew that the sheep were in a diseased condition, so as to constitute negligence in keeping them, merely because four days after the supposed negligence he made use of an expression which implied that he knew that the sheep then had the scab, and at the same time stated his belief as to the way in which they probably got it. Bearing in mind the very short time the sheep had been in the defendant's field, it is too much to say that his statement on a particular day that he knew that the sheep were diseased, is evidence that he also knew it four days before. I think that not only in point of law, but good sense, there was no evidence that at the time of the supposed negligence the defendant knew that the sheep were "scabby"; consequently there was no evidence of negligence which my brother *Channell* could have left to the jury. Therefore his ruling was perfectly correct, and the rule must be discharged.

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Rule discharged.

GEERE v. CHARLES MARE.

May 27.

THE declaration stated that by an indenture dated &c., and made in the lifetime of Thomas Geere, since deceased, between the defendant of the one part, and Thomas Geere and the plaintiff of the other part, and sealed with the seal of the defendant: after reciting that one Samuel Mare, agreed to pay him an additional composition, which was secured by a bill of exchange drawn by the plaintiff upon and accepted by the defendant's brother. The bill being dishonoured, and the plaintiff having threatened legal proceedings, the defendant by indenture assigned to the plaintiff a policy of assurance as a security for payment of the bill.—*Held*, that the indenture was tainted with the illegality of the original transaction, and therefore could not be enforced.

The defendant being indebted to the plaintiff and other creditors, in order to induce the plaintiff to accept a composition

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the brother of the defendant, was indebted to the said Thomas Geere and the plaintiff in the sum of 1487*l.* 19*s.* 10*d.*, upon an overdue bill of exchange therein described, and that the said Thomas Geere and the plaintiff had threatened to commence legal proceedings against the said Samuel Mare to enforce the payment of the said bill; but that the defendant had applied to and requested the said Thomas Geere and the plaintiff to abstain from such proceedings upon his securing to them the said sum of 1487*l.* 19*s.* 10*d.* by mortgage of the policy of assurance thereafter mentioned, which they had agreed to do; and also reciting a policy of assurance effected on the life of the defendant for 3000*l.*; the defendant assigned to the said Thomas Geere and the plaintiff, their executors, &c., subject to a proviso for redemption in the said indenture mentioned, the said policy of assurance of the said sum of 3000*l.* thereby assured: and the defendant, by such indenture, covenanted with the said Thomas Geere and the plaintiff that he should and would, whilst any monies should continue due on the security of the said indenture, pay the annual premiums payable in respect of the said policy; and, in case default should be made by the defendant, that then it should be lawful for the said Thomas Geere and the plaintiff, their executors, &c., to keep on foot the said insurance, and that the defendant would, in that case, pay on demand to the said Thomas Geere and the plaintiff all sums of money paid by them.—Breach: nonpayment of premiums amounting to 107*l.* 5*s.*

Plea.—That before the accepting of the bill of exchange in the declaration and hereinafter mentioned, and before the making of the indenture in the declaration mentioned, the defendant was indebted to the plaintiff and the said Thomas Geere, to wit, in the sum of 5951*l.* 19*s.* 7*d.*, and was also indebted to divers other persons in divers other sums;

and thereupon, while so indebted to the plaintiff and the said Thomas Geere and the said other persons, and before the accepting of the said bill of exchange and the making of the said indenture, the defendant was in bad and embarrassed circumstances, and unable to pay or satisfy the plaintiff and the said Thomas Geere and the said other creditors of the defendant, respectively, their said debts in full, whereof the plaintiff and the said Thomas Geere and the said other creditors then had notice; and thereupon the defendant then proposed and agreed, to and with the plaintiff and the said Thomas Geere and divers of his the defendant's said other creditors, to pay to them, the plaintiff and the said Thomas Geere and the said last mentioned other creditors, and the plaintiff and the said Thomas Geere and the said last mentioned other creditors of the defendant agreed to accept of the defendant, the sum of 5s. in the pound as a composition for, upon and in full discharge and satisfaction of their respective debts in full. And the defendant further saith, that before and at the time of the making of the said agreement, and of the carrying out of the same, it was unlawfully and fraudulently agreed by and between the plaintiff and the said Thomas Geere, and the defendant and the said Samuel Mare in the declaration and hereinafter mentioned, without the knowledge or consent and in fraud of the said last mentioned other creditors, and in order to give the plaintiff and the said Thomas Geere a fraudulent preference beyond the said last mentioned other creditors, and to induce the plaintiff and the said Thomas Geere to accept the said proposal and to be a party to the said first mentioned agreement, that he, the defendant, should then secure to the plaintiff and the said Thomas Geere an additional and further composition of 5s. in the pound upon their said debt, and that the same should be secured in manner following, that is to say, that the plaintiff and the

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said Thomas Geere should assign their said debt to the said Samuel Mare, and that the said Samuel Mare should accept the said bill of exchange in the declaration mentioned, drawn upon him by the plaintiff and the said Thomas Geere, for and on account of, and as security for the payment of the said additional and further composition of 5*s.* in the pound, amounting to 1487*l.* 19*s.* 10*d.*, upon the said debt of the plaintiff and the said Thomas Geere, and that the defendant should pay or procure to be paid to the said Samuel Mare, and the said Samuel Mare should accept the sum of 1487*l.* 19*s.* 10*d.* as the amount of the said first mentioned composition of 5*s.* in the pound upon the said debt of the plaintiff and the said Thomas Geere; and that the said Samuel Mare should pay over the same to the plaintiff and the said Thomas Geere. And the defendant further says, that the said Samuel Mare, with full notice and knowledge of the premises, agreed with the plaintiff and the said Thomas Geere and the defendant, that the said debt should be so assigned, and the said bill of exchange should be so accepted as such security, and the said money so received and paid over by the Samuel Mare as aforesaid. And the defendant further says, that afterwards and without the knowledge or consent of the said last mentioned other creditors, and in fraud of them, and for the purpose of unlawfully and fraudulently securing to the plaintiff and the said Thomas Geere such further and additional composition of 5*s.* in the pound on their said debt, the plaintiff and the said Thomas Geere did assign the said debt to the said Samuel Mare in the declaration mentioned, and the said Samuel Mare accepted the said bill of exchange in the declaration mentioned, drawn upon him by the plaintiff and the said Thomas Geere for and on account of and as a security for the payment of the said additional and further composition of 5*s.* in the pound upon the said debt of the plaintiff and the said

Thomas Geere; and the defendant procured to be paid, to wit, by one W. Quilter to the said Samuel Mare, and the said Samuel Mare accepted the sum of 1487*l.* 19*s.* as the amount of the said first mentioned composition of 5*s.* in the pound upon the said debt of the plaintiff and the said Thomas Geere, and the said Samuel Mare then paid over the same to the plaintiff and the said Thomas Geere. And the defendant further saith, that there never was any consideration or value for the acceptance of the said bill of exchange in the declaration mentioned by the said Samuel Mare, or for the payment by him of any part of the amount thereof, save and except as aforesaid, and the plaintiff and the said Thomas Geere have always held, and the plaintiff now holds the said bill of exchange, without any consideration or value whatever, save and except as aforesaid. And the defendant further saith, that the said bill of exchange was overdue and unpaid at the time of the making of the said indenture in the declaration mentioned; and that the alleged debt in the said indenture mentioned, then alleged to be due from the said Samuel Mare to the plaintiff and the said Thomas Geere upon the said bill of exchange in the declaration mentioned, was the amount of the said bill of exchange so accepted by the said Samuel Mare, as in this plea particularly mentioned, and not any other or different debt, and that the said Samuel Mare was not indebted to the plaintiff and the said Thomas Geere as is in the declaration and indenture mentioned, save and except as aforesaid; and thereupon afterwards and with full notice to the plaintiff and the said Thomas Geere, and the defendant and the said Samuel Mare, of all the matters and things in this plea hereinbefore set forth, the defendant, as a security to the plaintiff and the said Thomas Geere for the payment of the said further and additional composition of 1487*l.* 19*s.* 10*d.* so secured by the said bill of exchange, and in order to induce the plaintiff and the said

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Thomas Geere to abstain from such proceedings upon the said bill of exchange in the declaration mentioned, executed the said indenture, and made the said agreement, and entered into the said covenants in the declaration mentioned.

Demurrer, and joinder therein.

Murphy (*Lush* with him), in support of the demurrer. —The question is whether this case falls within the principle of the decision in *Fisher v. Bridges* (a), viz., that where a deed is given as a security for the payment of a debt tainted with illegality, the law, which would not enforce the payment of the debt, will not enforce the payment of the security. There the covenant was entered into for payment of part of the purchase money of land conveyed by the plaintiff to the defendant for an illegal object, so that it was clearly connected with the original contract. But here it was no part of the agreement under which the bill of exchange was given that the defendant should execute the indenture declared on. The consideration for the indenture was the forbearance to sue Samuel Mare; not the original contract. If the defendant had paid the amount claimed, he could not have recovered it back. [*Bramwell*, B.—Suppose a person obtained a bill of exchange by burglary, and threatened to sue the acceptor, when a third person, in consideration of proceedings being stayed, covenanted to pay the amount within a year. Could that covenant be enforced?] Assuming that no action could have been maintained upon the bill of exchange, and that any security given by Samuel Mare for its payment could not be enforced, here the security is given by a third person and upon a new and valid consideration. The deed is not more illegal because it is executed by the original debtor than if it had been executed by a stranger.— He also referred to 1 Smith's Lead. Cas. p. 334, 5th ed.

(a) 3 E. & B. 642.

Shee, Serjt. (*Archibald* with him), in support of the plea.—
The bill of exchange is void as a fraud upon the other creditors, and the indenture having been executed as a security for its payment is tainted with the illegality and also void. The defendant is not in the position of a stranger. He is the original debtor and a party to the original illegal agreement, and he executed the indenture in pursuance of a new agreement, for the purpose of carrying into effect the original illegal agreement. It was only another mode of securing to the plaintiff the additional composition of 5s. in the pound. *Fisher v. Bridges* (a) is expressly in point.

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Murphy replied.

POLLOCK, C. B.—We are all of opinion that this case falls within the rule laid down by the Exchequer Chamber in *Fisher v. Bridges* (a), and therefore the plaintiff is not entitled to recover. The facts are clear. A bill of exchange was accepted, not by the present defendant, but by his brother, under an arrangement with the plaintiff and another person, which was a fraud upon the other creditors of the defendant, and on obvious principles the bill was void, although the acceptor was not the real debtor. The bill was not paid when due, and legal proceedings were threatened against the acceptor, when a further arrangement was made, by which proceedings against the acceptor were to be stayed and the payment of the amount of the bill of exchange was to be secured by the defendant, who was the real debtor, executing the indenture declared on. It is impossible not to see that the case falls within the principle of the decision in *Fisher v. Bridges*. I entertain a strong opinion that, apart from authority, I should have decided in the same way, but I consider that we are bound by that decision.

(a) 3 E. & B. 642.

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BRAMWELL, B.—I am of the same opinion. The indenture declared on was executed as a security for the payment of a debt founded on an illegal consideration, and as the debt could not be enforced against the debtor, neither can it be enforced against the person who has executed the security for its payment. It seems to me, both in reason and on the authority of *Fisher v. Bridges*, that our judgment ought to be for the defendant. As to whether the defendant is in a better or worse position than if the original debt had been due from another person, I express no opinion. It is sufficient to say that he executed the indenture to secure the payment of an illegal debt, and as that debt could not be enforced neither can the security be enforced.

WILDE, B.—I am of the same opinion. I agree with the rest of the Court that the case falls within the principle of the decision in *Fisher v. Bridges*. The indenture was executed by the defendant for the purpose of carrying into effect his original intention of giving a particular creditor 5s. in the pound more than the rest. Although the facts are somewhat complicated by the defendant's brother becoming the debtor, and the original debtor again taking upon himself the liability, for the purpose of hiding the true character of the transaction, it is clear that the defendant executed the indenture in order to carry into effect the original illegal agreement. For these reasons I think that the defendant is entitled to judgment.

Judgment for the defendant.

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THE ATTORNEY GENERAL v. JONES.

INTRUSION.—The information stated, that a certain piece of land, about eighty yards in length and forty yards in width, situate on the sea shore adjacent to the village of Cem-maes, in the parish of Llanbadrig, in the county of Angle-sea, in the hands and possession of her Majesty, on the 1st day of January, A.D. 1851, and long before and continually thence hitherto, was and stood, and of right still ought to be and stand, as in right of her Crown of England, as in and by very many records of this Exchequer appears on record. Nevertheless the defendant, contriving the disinherison of her Majesty, with force and arms, heretofore, to wit, on the day and in the year aforesaid, and on divers other days and times between that day and the commencement of this suit, in and upon the possession of her Majesty of and in the premises, entered and intruded, and made entry, and the issues and profits thereof coming perceived and had, and as yet doth perceive and have to his own use, and dug up and subverted and spoiled the earth and soil thereof, and built and erected thereon a certain pier or breakwater, and has kept and continued the same thereon thence hitherto, and thereby and therewith greatly incumbered the said land and premises, the same trespass and intrusion thence hitherto and as yet continuing, in contempt of her Majesty, &c.

Plea.—That neither the possession, nor the right of actual

On the trial of an information of intrusion, the question being as to the title of the defendant, as against the Crown, to a portion of the sea shore between high and low water mark, adjacent to Cem-maes in the isle of Anglesea, the defendant gave in evidence a grant by James I. of the manor of Cem-maes to an ancestor of the present lord of the manor, and also gave evidence of acts of ownership over the shore in question both by himself and the lord of the manor; and there was also evidence of acts of ownership on the part of the Crown.

The learned Judge told the jury that the grant of the manor did not pass the sea shore, and he left it to the jury to say whether they were satisfied by the evidence of user that the defendant had acquired a title as against the Crown.—*Held*, a misdirection; and that the proper question was whether the evidence of user coupled with the grant satisfied the jury that the defendant had such title.

Quære, whether the Venedotian Code of Howel Dda is now the law of Anglesea.

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possession of the land and premises by the said information claimed to be in her Majesty, was not nor is in her Majesty, as by the said information alleged or supposed.—Issue thereon.

At the trial before *Keating*, J., at the Cheshire Spring Assizes, 1862, it appeared that the information was filed by the Attorney General to recover possession, on behalf of the Crown, of a portion of the sea shore between high and low water mark, at Cemmaes, in the Isle of Anglesea. In the year 1835, a pier or breakwater was built on the land in question, for the purpose of affording shelter to vessels in Cemmaes harbour. This pier was about eighty-two yards long and six yards broad, and was built with money raised by public subscription, under the superintendence of a committee, of which the defendant was a member. The committee received tolls and applied them to the repair of the pier. About fifty-five years ago, a pier had been erected nearly on the same spot, but it was suffered to decay, and was ultimately washed away by the sea.

The defendant gave in evidence an inquisition taken under a commission issued by King Edward 1, in the 9th year of his reign, “concerning the laws and customs of Wales;” and also the laws of Howel Dda (*a*), which were mentioned in the inquisition; and it was contended that by virtue of the statute of Rutland, 12 Edw. 1, and the 27 Hen. 8, c. 26, s. 31, these laws are still in force in the county of Anglesea. Among the laws in the “Venedotian Code” of Howel Dda is the following (*b*):—“Whoever possesses land upon the margin of the shore, owns as much of the beach as the breadth of his land; and he may make a weir or other things thereon, if he will;

(*a*) These laws appear to have been collected by Howel Dda, a king of South Wales, about the

beginning of the 10th century.

(*b*) Book ii., chap. xvi., par. 6, p. 87, folio ed.

but if the sea throw any things upon the land or upon that beach, they belong to the king; for the sea is a pack-horse to the king." It was proved that the defendant was the owner in fee of the land adjoining the portion of the shore claimed by the Crown. The defendant also gave in evidence an "Extent of lands subject to the government of the Exchequer of Carnarvon," in the 26 Edw. 3, 1352. In the "Extent of the county of Anglesea" the "Manor of Cemmaes" was mentioned, and evidence was adduced to shew that it extended to the sea shore at the place in question. The defendant also gave in evidence a grant of the manor of Cemmaes by letters patent, dated at Westminster, 7 James 1, to an ancestor of the present lord of the manor. In this grant were mentioned "fisheries, fishings, wrecks of the sea, and all other rights, jurisdictions, franchises, liberties, privileges, profits, commodities." Formerly there was an island rock, which was blasted when the present pier was built, and the defendant had used some of the stones for building the pier. Beyond the pier was a weir. The defendant adduced evidence to prove that the lord of the manor had prevented people from taking sand from the shore near the pier; and on one occasion he had claimed and taken possession of a piece of timber, part of a wreck found there; but it appeared by evidence in reply, that the public were accustomed to take sand from the sea shore, and the surveyor of highways had taken stones for their repair: that Lloyd's agent had on several occasions taken possession of wrecks for the owners and underwriters; and that in the year 1857 an inquiry was held under the Merchant Shipping Act, 17 & 18 Vict. c. 104, ss. 472, 473, respecting claim to wreck at Cemmaes, at which the lord of the manor put in a claim but offered no evidence.

The learned Judge directed the jury, that the presumption

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of law, that the sea shore between high and low water mark belonged to the Crown, extended to Wales, and that the right of the Crown was not affected by the statutes, 12 Edw. 1, and 27 Hen. 8, c. 26 : that although the grant of James 1 of the manor of Cemmaes gave a right to "wreck," it did not in terms give any right to the sea shore between high and low water mark : that the question for their consideration was whether, upon the evidence of acts of user, they were satisfied that the *primâ facie* title of the Crown to the sea shore between high and low water mark was displaced by title in the defendant or the lord of the manor.

The jury gave a verdict for the Crown; and stated that they found, first, that the site of the rock belonged to the defendant, and the sea shore to the Crown : secondly, that there was no evidence that the lord of the manor ever took or claimed wreck.

*McIntyre*, in the following Term, obtained a rule nisi for a new trial, on the ground that the learned Judge misdirected the jury, in directing them that there was no evidence on the part of the defendant of a grant of the sea shore at Cemmaes in Anglesea by the Crown ; and in directing them that the ancient laws of Wales did not apply to this case ; against which

*The Attorney General, Welsby, and Beavan* shewed cause in the following Trinity Term (a) (June 6).—First, there was no misdirection. The sea shore between high and low water mark *primâ facie* and of common right belongs to the Crown: Hale *de jure Maris*, part 1a, cap. 4, 111 (1); and there was no evidence to rebut the *primâ facie* title of the Crown. The evidence was of such a nature that if a ver-

(a) Before *Pollock*, C. B., *Martin*, B., *Bramwell*, B., and *Channell*, B.


dict had been found for the defendant it would have been against the weight of evidence.—They argued, secondly, that the common law right of the Crown was not affected by the Venedotian Code of Howel Dda, which was not now the law of Anglesea: thirdly, that the grant by James I of the manor of Cemmaes of “wreck” and “fishing” did not convey any right to the sea shore between high and low water mark. They cited *The Attorney General v. Chambers* (a).

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*McIntyre, Morgan Lloyd, and Vaughan Williams*, in support of the rule.—First, the learned Judge misdirected the jury in telling them that the grant of the manor of Cemmaes did not include the sea shore between high and low water mark. The manor having vested in the Crown in right of its principality of Wales, the word “manor” would include the shore between high and low water mark. At all events, the grant of wreck and fishings raises a presumption that it is so included. In Hale, *de Jure Maris*, part 1, cap. 6, I. 3, it is said, “It may not be parcel of a manor, but de facto it many times is so; and perchance it is parcel almost of all such manors as by prescription have royal fish or wrecks of the sea within their manor.” And the learned author, after observing that there are perquisites which happen between the high and low water mark, proceeds to say, “He therefore that hath wreck of the sea or royal fish by prescription infra manerium, it is a great presumption that is part of the manor, as otherwise he could not have them.” [*Martin, B.*, referred to *Les Termes de la Ley*, “Wreck.”].—Secondly, the learned Judge should have told the jury that the sea shore between high and low water mark may be parcel of a manor, and that in this case the words of the grant were sufficiently large to include that shore; and he should have left it to

(a) 4 De Gex, Mac. &amp; G. 206.

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them to say whether the evidence of user, coupled with the grant, satisfied them that the sea shore between high and low water mark was granted as part of the manor of Cemmaes. *The Duke of Beaufort v. The Mayor of Swansea* (a) is an express authority that ancient grants may be explained by evidence of modern usage, upon a question as to what passed by such documents. *Calmady v. Rowe* (b) decided that acts of ownership exercised by the lord of the manor upon the sea shore adjoining, between high and low water mark, such as the exclusive taking of sand, stones and sea-weed, may be called in aid to shew that the shore is parcel of the manor, where an ancient grant under which the manor is held professes to grant the manor with "wreck of the sea," "several fishery," and other rights of an extensive description, but does not expressly purport to convey "littus maris." The learned Judge excluded the grant from the consideration of the jury, and merely directed their attention to the acts of ownership.—They also argued that the Venedotian Code of Howel Dda was still the law of the county of Anglesea.

*The Attorney General*, in reply, referred to *Dickens v. Shaw* (c).

*Cur. adv. vult.*

BRAMWELL, B., now said.—This was an application by the defendant for a new trial on the ground of misdirection, and we are of opinion that the rule must be absolute. The question was whether the defendant had a title, as against the Crown, to a portion of the sea shore, between high and low water mark, adjacent to the village of Cemmaes,

(a) 3 Exch. 413.

(b) 6 C. B. 861.

(c) Hall on Sea Shore, 263, cited in 6 C. B. 884.

in the island of Anglesea. At the trial, the defendant gave in evidence a grant by James I of the manor of Cemmaes to an ancestor of the present lord of the manor, and the learned Judge ruled that the grant did not necessarily pass the shore in question. The defendant also gave evidence of acts of ownership over the foreshore by himself and the lord of the manor, and evidence of ownership was also given on the part of the Crown. The learned Judge left it to the jury to say whether upon the evidence of ownership the defendant had made out a title as against the Crown; and the jury found unfavourably to him.

Both these proceedings, separately taken, seem right enough, but upon the more mature consideration which we have been enabled to give the matter than could possibly be given to it at Nisi Prius, we have come to the conclusion that the objection now raised by the defendant is good, namely, that the learned Judge should have coupled the evidence of ownership with the grant, and have told the jury that although the grant did not necessarily pass the shore between high and low water mark, yet that it might do so, and that whether it did or not they were to determine upon consideration of all the other evidence. That direction, however, was not given, and it might, no doubt, be very material to the defendant that it should have been; because, upon the direction which was given, the question was whether the defendant had shewn a sufficient title as against the Crown, without producing any grant of the manor; whereas, upon the direction which we think ought to have been given, the question would be, whether the grant, coupled with the evidence of acts of ownership, was sufficient to induce the jury to believe that the shore in question passed by the grant. We think, therefore, that on that ground there must be a new trial.

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With respect to the other point, as to the laws of Howel Dda, we think it scarcely necessary, on the present occasion, to say anything; because, in all probability, if that point is again raised, it will be under different circumstances and with different proof; therefore we must leave it to be dealt with by the learned Judge who tries the cause, without any expression of opinion on our part, which would necessarily be imperfect.

Rule absolute (a).

(a) The cause was again tried before *Channell, B.*, at the Cheshire Summer Assizes, 1862, when additional evidence of user was adduced on the part of the defendant, and, the learned Baron having directed the jury in accordance with the above judgment, they found a verdict for the defendant. The evidence of the laws of Howel Dda cited above (p. 348) was objected to, and rejected. In the following Michaelmas Term, the Attorney General obtained a rule nisi for a new trial, on the ground of misdirection: first, that there was no evidence which ought to have been left to the jury to shew that the locus in quo was within and parcel of the manor of Cemmaes: secondly, that there was no evidence which ought to have been left to the jury to shew that there had been any possession of the locus in quo ad-

verse to the Crown for sixty years before the filing of the information, so as to bar the title of the Crown under the 9 Geo. 3, c. 16: thirdly, that the learned Judge misdirected the jury as to the construction of the grant of King James I.; and also on the ground that the verdict was against the weight of evidence. This rule was argued, on the 28th January, 1863, by *The Attorney General, Welsby, Beavan, and Giffard* for the Crown; and by *McIntyre, Morgan Lloyd, and Vaughan Williams* for the defendant. The case was reargued upon one point on the 28th January, 1864, by *Giffard* for the Crown, and *McIntyre* for the defendant, when the Court discharged the rule, holding that no misdirection was shewn, and that there was evidence to support the verdict.



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MARY NOBLE v. THE GOVERNOR AND COMPANY OF THE
BANK OF ENGLAND.

June 12.

ROBINSON had obtained a rule calling on the defendants to shew cause why the plaintiff should not recover her costs by virtue of the 122nd section of "The London (City) Small Debts Extension Act, 1852" (15 Vict. c. lxxvii.).

The action was brought to recover the amount of a lost Bank of England note. The declaration stated that the defendants on, &c., by their promissory note, numbered 28,789, promised to pay to the bearer on demand 10*l.*, and the plaintiff became and was the lawful bearer of the said promissory note, and duly demanded payment thereof; yet the defendants refused to pay the same. The defendants pleaded: first, that the note was a Bank of England note payable to bearer on demand, and transferable by delivery, and after the making of the said note, and whilst the plaintiff was the bearer thereof, and before she demanded payment thereof, the plaintiff lost the same out of her possession and control, and the same thence hitherto has been and still is lost: secondly, that the plaintiff did not duly demand payment of the note as alleged: thirdly, that the note was a Bank of England note payable to bearer on demand and transferable by delivery, and that the plaintiff did not present the note for payment: fourthly, that the plaintiff was not at the commencement of this suit the lawful bearer of the said promissory note.

The plaintiff brought an action in a superior Court to recover 10*l.*, the amount of a Bank of England note. The defendants pleaded with other pleas, that the note was lost. Whereupon the plaintiff obtained an order of a Judge, under the 87th section of the Common Law Procedure Act, 1854, that upon indemnity being given the plea that the note was lost should be struck out. The defendants, by leave of a Judge, then withdrew his other pleas and paid 10*l.* into Court, which the plaintiff accepted in satisfaction of his claim.—*Held*, that plaintiff was deprived of

costs by the 120th section of "The London (City) Small Debts Extension Act, 1852" (15 Vict. c. lxxvii.), and that the case was not within the exception in the 122nd section, of a cause of action for which no plaint could have been entered in the Court.

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The plaintiff then took out a summons at Chambers under the 87th section of the Common Law Procedure Act, 1854, which was heard before *Wilde*, B., who ordered "that the loss of the note upon which this action is brought shall not be set up, provided an indemnity is given, to the satisfaction of the Master, against the claim of any other person upon the said note. The first plea to be struck out, and the loss of the instrument not to be set up under the other pleas."

The defendants then took out a summons for leave to withdraw all the other pleas, and substitute a plea of payment of 10*l.* into Court; and an order was made by consent. The defendants having pleaded payment of 10*l.* into Court, the plaintiff replied by accepting it in satisfaction of her claim. The plaintiff then took out a summons for leave to tax her costs. This summons was heard before *Wilde*, B., who declined to make an order, and referred the matter to the Court. The present rule was thereupon obtained; against which

Hannen shewed cause.—Before the Common Law Procedure Act, 1854, the defendants could have defeated any action against them, either in a superior or inferior Court, by a person who had lost any of their notes. By the 87th section of that Act: "In case of any action founded upon a bill of exchange or other negotiable instrument, it shall be lawful for the Court or a Judge to order that the loss of such instrument shall not be set up, provided an indemnity is given to the satisfaction of the Court or Judge, or a Master, against the claims of any other person upon such negotiable instrument." But no such power is conferred on inferior Courts. By the 120th section of "The London (City) Small Debts Extension Act, 1852" (15 Vict. c. lxxvii.), if in any action in any of the superior Courts, in covenant,

debt, detinue or assumpsit, not being an action for breach of promise of marriage, the plaintiff shall recover a sum less than 20*l.*, he "shall have judgment to recover such sum only, and no costs, *except in the cases hereinafter provided.*" That refers to the 122nd section, which provides, "that if in any such action, &c., the plaintiff shall make it appear to the satisfaction of the Court in which such action was brought, or to the satisfaction of a Judge at chambers, upon summons, that the said action was brought for a cause (amongst others) *for which no plaint could have been entered in the Court*, then and in such case the Court in which the said action is brought, or the said Judge at chambers, may thereupon, by rule or order, direct that the plaintiff shall recover his costs," &c. Therefore, the plaintiff is deprived of costs by the 120th section, unless the case falls within the exception contained in the 122nd. The words in that section, "for which no plaint could have been entered in the Court," do not mean, "for which if a plaint were entered there would be a complete defence," but a plaint over which the Court has no jurisdiction; as assumpsit for breach of promise of marriage, or malicious prosecution, libel, slander, or seduction. It is clear that the plaintiff might have entered a plaint in the Sheriffs' Court, although, in such case, she could not have the benefit of the provisions of the 87th section of the Common Law Procedure Act, 1854.

Robinson, in support of the rule.—If the plaintiff had sued in the Sheriff's Court she must have failed, because the note was lost, and the provisions of the 87th section of the Common Law Procedure Act, 1854, do not extend to that Court. In one sense no plaint could have been entered in the Sheriffs' Court, because the plaintiff could only sue successfully in a superior Court. The language

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of the 122nd section is sufficiently large to embrace this case. *Hunt v. The North Staffordshire Railway Company* (a) shews that in considering the question of jurisdiction the Court will look at the substance of the transaction.

POLLOCK, C. B.—I am of opinion that the rule ought to be discharged. In my judgment this is a *casus omissus*. The owner of a lost Bank of England note brings an action in this Court to recover its amount. The defendants plead that the note was lost. By the 87th section of the Common Law Procedure Act, 1854, the Court, or a Judge, has power to deprive a defendant of that defence, provided an indemnity be given against the claim of any other person. Perhaps it would have been better, where the owner of a lost note is desirous of obtaining payment, if he could apply to a Judge at Chambers for an order before action brought, so that the maker of the note, if satisfied with the indemnity, might immediately pay the amount. I own it appears to me somewhat inconvenient that there should be the extra expense of bringing an action, and then the defendant should be restrained from setting up the loss of the note. That, however, does not seem to have been in the contemplation of the legislature.

Now, the 120th section of the 15 Vict. c. lxxvii. deprives a plaintiff of costs who recovers in actions of contract less than 20*l.*, unless the case comes within the exceptions mentioned in the 122nd section, one of which is, if the plaintiff satisfies the Court in which the action is brought, or a Judge, that it is brought for a cause “for which no plaint could have been entered in the Court.” Here the cause of action is one for which a plaint could have been

(a) 2 H. & N. 451.

entered in the inferior Court, just as well as this action in a superior Court. The defence in each would be the same, yet because it happens that by suing in a superior Court the plaintiff can obtain the order of a Judge to prevent the loss of the note from being set up as a defence, we are asked to extend the language of the 122nd section of the 15 Vict. c. lxxvii. (which passed before the Common Law Procedure Act, 1854) so as to comprehend this case. I am clearly of opinion that we cannot. Where an action is brought in a superior Court on a lost promissory note for less than 20*l.*, and the defendant, on being satisfied with the indemnity, pays the amount, I think that, if the case is within the 120th section of the 15 Vict. c. lxxvii., the plaintiff is not entitled to costs under the 122nd section.

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MARTIN, B.—My Lord having expressed a strong opinion on the subject, I do not mean to say anything to the contrary. In construing acts of parliament there is always difficulty in applying their language to cases which were not in the contemplation of the legislature. It is a difficulty which constantly arises. The circumstances of this case are such that if the plaintiff had consulted any counsel as to whether she could maintain a plaint in the Sheriffs' Court, he would have told her that she could not; that she could only succeed by virtue of the 87th section of the Common Law Procedure Act, 1854, and that, in order to obtain the benefit of that enactment, an action must be brought in a superior Court. The question then is whether the words in the 122nd section of the 15 Vict. c. lxxvii., "for which no plaint could have been entered in the Court," apply to a case in which the plaintiff would have been told by counsel that she could not successfully enter a plaint in that Court? I should have been glad if I could have so

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construed the Act as to give the plaintiff her costs; but although at one time I entertained some doubt, I now think that the case is not within the 122nd section.

CHANNELL, B.—I entirely agree with the opinion expressed by the Lord Chief Baron. The 120th section, if it stood alone, would clearly deprive the plaintiff of costs; and I think this case is not excepted from its operation by the 122nd section. No doubt, the plaintiff obtained an advantage by suing in a superior Court, for if she had sued in the Sheriffs' Court she could not have applied to a Judge, under the 87th section of the Common Law Procedure Act, 1854, to prevent the defendants from setting up the defence that the note was lost, and consequently must have failed in her plaint. But in my opinion the words in the 122nd section, "for which no plaint could have been entered in the Court," do not mean "for which no plaint could be successfully entered," but they refer to a plaint over which the Court has no jurisdiction, and which a superior Court would prohibit them from entertaining. That cannot be said of this case.

WILDE, B.—I cannot help saying that I think this a very hard case. The plaintiff brought her action in a superior Court, where alone she could obtain redress; and the defendants pleaded, with other pleas, a technical defence that the note was lost. The plaintiff then offered an indemnity, and upon its being given the plea that the note was lost was struck out, and then the defendants withdrew their other pleas and paid into Court the amount of the note. Under these circumstances, I think, as a matter of justice, the plaintiff ought to have her costs; but the act of parliament intervenes, and although at one time I was disposed to participate in the doubt entertained by my brother *Martin*, I am now satisfied

that the view which I took at Chambers was correct. The words in the 22nd section "for which no plaint could have been entered in the Court," mean "legally entered." They point to the character of the plaint, not to whether there would be a complete defence to it. Here the plaintiff might have entered a plaint in the Sheriffs' Court, as well as bring an action in this Court, and have had the case determined on the merits, but for the difficulty arising from the note being lost. It seems to me therefore, with every desire to put on the Act a construction favourable to the plaintiff, that she is not entitled to costs.

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Rule discharged.



## TRINITY VACATION, 27 VICT.

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Except in cases for which the Succession Duty Act (16 & 17 Vict. c. 51) specially provides, the value of the "annuity," which forms the basis of assessment of real property for the purposes of that Act, is the actual annual value of the property in its condition, and as used for the purposes to which it is devoted, at the time when the successor becomes entitled in possession. Consequently real property, which at that time is wholly unproductive and incapable of being used productively for agricultural or other purposes, and which is not in the market as building land, though subsequently sold as building land during the successor's lifetime, has not within the meaning of the 21st section of that Act any "annual value," and is not liable to succession duty.—*Held*, by Pollock, C. B., and Wilde, B. Dissentiente Martin, B.

**I**NFORMATION in equity by the Attorney General, as follows:—

1. Upon the death of the late Earl of Sefton, which took place on the 2nd of August, 1855, and under the disposition made by his will, the defendant became entitled to certain real property, in respect of the greater part of which he admitted he was liable to pay, and actually did pay, succession duty at the rate of 1% per cent. on the value thereof as upon a succession derived from his father the late earl; but in respect of the residue of the said real property, consisting of certain plots of land, part of the Toxteth Park Estate at Liverpool, amounting altogether, as the defendant alleges, to 48,000 square yards and upwards, the defendant then declined to pay, and did not in fact pay, any succession duty, and denied that any such was payable. The defendant in 1862 sold some part of this land, namely, one portion, containing, as he alleges, about 1561 square yards, at 16s. per square yard, and a second portion, containing, as he alleges, about 1000 square yards, at 6s. per square yard; and the object of this information is to recover payment of succession duty at the rate aforesaid in respect of the land so sold. It is alleged by the defendant, and not disputed by the Attorney General, that


at the time of the death of the defendant's father, and of his becoming entitled as aforesaid to the land in respect whereof he so declined to pay succession duty, the same was not in demand or marketable as building land, nor was it capable of being sold or let profitably as such, and that the custom in Liverpool is for the owner of land which is building land to sell it absolutely for building on, and not to let it upon long leases or otherwise for building, and that the said land was not at the time of the defendant's becoming entitled thereto capable of being used productively for agricultural or other purposes, and that such land was then and had been for ten years previously, and (except that portion thereof which has been sold as before stated) has ever since been wholly unoccupied and unproductive, and that during no part of that time has any income or annual profit been derived from it. And the portion thereof which has been sold as before stated, had, ever since the defendant's becoming entitled thereto, up to the times when the same was sold, been wholly unoccupied and unproductive, and that during no part of that time was any income or annual profit derived from such portion.

2. Subsequently to the death of the late Earl of Sefton some discussion took place between the defendant's solicitors and Mr. Trevor, the Comptroller of Legacy and Succession Duties, with reference to the land in respect of which the defendant so declined to pay duty, and ultimately the defendant delivered to the Commissioners of Inland Revenue an account for assessment, which was accompanied by a notice in the following terms:—

“I hereby give you notice that the several plots of land specified in the schedule (E.) hereto annexed, forming a part of the Toxteth Park Estate devised to me by the will of the late Charles William Earl of Sefton, deceased, are not comprised in the return this day made by me pursuant to the Succession Duty Act, 1853, inasmuch as the same

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plots of land, being wholly unoccupied and unproductive, and not capable of yielding income, fluctuating or otherwise, I am advised that no succession duty is or will be payable thereon.

“2nd of April, 1857.”

“Sefton.”

“To the Commissioners of Inland Revenue.”

3. The schedule (E.) referred to in such notice comprises various plots of land, containing altogether a quantity of 48,272 square yards.

4. After receiving this notice Mr. Trevor wrote and sent to the defendant a letter in the following terms:—

“My Lord.

“Inland Revenue, April 6, 1857.

“I have the honour to acknowledge the receipt of your Lordship’s notice, dated the 2nd instant, relative to your succession upon the death of the late Earl of Sefton to 48,272 square yards of land. This land, not at present yielding any income, has not been noticed in the assessment made on the 3rd instant of the amount of succession duty payable by your Lordship. But if, after any interval from the late Earl’s death, you should derive income or profit from this land, I beg to observe that your Lordship will be expected to deliver a further account in order that succession duty may then be calculated according to such value thereof.”

5. No answer was sent to this letter by the defendant or his legal advisers, nor did he or they in any way express his or their assent to or acquiescence in the view therein expressed as to the defendant’s liability to deliver a further account for the purpose of succession duty being calculated.


6. On the 22nd of April, 1862, the defendant’s solicitors wrote and sent to Mr. Trevor a letter of that date in the following terms:—

“You will recollect that Lord Sefton, in submitting to the office accounts of the real property to which he became entitled on the death of his father, the late Earl of Sefton,

for the assessment of succession duty thereon, gave notice to the Commissioners of Inland Revenue on the 2nd of April, 1857, that certain land specified in schedule E. thereto annexed, was not comprised in his return, inasmuch as, the same being wholly unoccupied and unproductive, and not capable of yielding income, fluctuating or otherwise, he was advised that no succession duty was or would be payable thereon. Lord Sefton, in answer to his communication, received a letter from you, informing him that the land referred to by him had not been noticed in the assessment of succession duty, but that if after any interval he should derive income or profit from that land he would be expected to deliver a further account in order that succession duty might be calculated according to the value thereof. Under these circumstances Lord Sefton considers it right to inform you that he has recently sold a portion of the land specified in the schedule E. to his notice, containing about 1561 square yards, at the rate of 16s. per square yard. Lord Sefton having been advised by counsel that no succession duty attached upon any part of the land comprised in that schedule, cannot now be advised to render any formal account of the land recently sold, or to pay any succession duty in respect thereof. We may add, however, that should the Commissioners still think that succession duty is payable, Lord Sefton will be glad to concur in a special case for the opinion of the Court, or in any other course by which the point can be expeditiously and satisfactorily decided."

7. The defendant alleges, and the Attorney General believes it to be the fact, that, at the time when the said lastly stated letter was written and sent, only the first mentioned portion of land had been sold, and that the secondly mentioned portion was sold subsequently.

8. The several statements contained in the notice and letters hereinbefore set forth, are according to the fact.

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The defendant still declines to pay any duty in respect of the land so sold by him as aforesaid.

The bill prayed (inter alia) a declaration that the defendant was chargeable with duty after the rate of 1*l*. per cent. in respect of his succession to the land mentioned in schedule E. to his aforesaid notice, or at least so much of such land as had already been or might at any time thereafter be sold or otherwise disposed of, and that the amount of such duty might, if necessary, be ascertained under the direction of the Court.

The answer of the defendant admitted the truth of the statements in the information, but denied that any succession duty was payable in respect of the land mentioned in the said schedule.

The Attorney General, The Solicitor General, Locke and Hanson argued for the Crown, in last Hilary Term (January 27).—The defendant, it is submitted, is clearly liable to duty under the 16 & 17 Vict. c. 51, and the sole difficulty consists in ascertaining by what rule the amount of duty is to be estimated. Section 2 defines a succession. The defendant is a successor within that definition. Section 10 imposes the duty according to the *value* of the succession at a rate, which is here admitted to be one per cent. It follows that, if this succession had value, duty must be payable. The 21st section enacts that, “The interest of every successor (except as herein provided) in real property shall be considered to be of the value of an annuity equal to the *annual value* of such property, after making such allowances as are hereinafter directed, and payable *from the date of his becoming entitled thereto in possession, or to the receipt of the income or profits thereof, during the residue of his life*, or for any less period during which he shall be entitled thereto; and every such annuity, for the purposes of this Act, shall be valued accord-

ing to the tables in the schedule annexed to this Act : and the duty chargeable thereon shall be paid by eight equal half-yearly instalments, the first of such instalments to be paid at the expiration of twelve months *next after the successor shall have become entitled to the beneficial enjoyment of the real property in respect whereof the same shall be payable, &c.*" Thus either, when this succession accrued, duty became payable according to its value ; or if, upon the fair construction of this section, duty was not then payable, inasmuch as there was no beneficial enjoyment in the shape of income, duty would in that view be payable from the time when such enjoyment first arose. There are several sections in the Act, which, by analogy, favour such a construction, and show that the legislature has acted upon a uniform principle in dealing with such questions. Thus, where there is a suspense of present enjoyable value, the principle which has been adopted appears to be, to suspend the payment of duty while the interest, quoad enjoyment, is in abeyance ; but when the abeyance ceases, and the value is realized, to impose the duty. Thus, for example, under the 5th section, which applies to determinable charges, when the charge determines an additional duty is payable. The 20th section deals in a similar way with outstanding interests. Timber, in the absence of a special agreement with the Commissioners, is under the 23rd section chargeable with duty from time to time as it is cut down and sold. So, by the 24th section, duty is not chargeable upon an advowson, unless it be sold, and then the purchase money is taken as the value for the purpose of duty. The 25th section does not tax the power of renewing a beneficial lease, but taxes the fine when it is received. By section 26 the principal value is, in the absence of agreement, taken as the basis of the calculation in the case of manors, opened mines, *or other real property which yields a fluctuating income.* The 37th

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section enacts in general terms that, "Where a successor shall not have obtained *the whole of his succession* at the time of the duty becoming payable, he shall be chargeable only with duty on the value of the property or benefit from time to time obtained by him &c." [*Pollock*, C. B.—Here the defendant obtained the whole of his succession at once, although it afterwards rose in value. The other sections, which have been referred to are exceptions to the general rule; and a case, not within the exception, falls within the rule.] At all events, these sections are not exhaustive, since, by the 39th section, if, in the opinion of the Commissioner, the value of a succession *is not fairly ascertainable under any of the preceding directions*, they may compound the duty. But the section does not point out how, in the absence of agreement, the amount of duty is to be ascertained. Either the sections which have been referred to do, or do not, establish a general principle, by analogy. If they do, the tax is imposed, when the value is realized. If they do not, they at all events do not prevent the imposition of the tax in cases which they do not govern.—They also referred to *Astbury v. Henderson* (a).

Mellish and *C. Hutton*, for the defendant.—The defendant is not liable to succession duty. Except in certain cases specially provided for, the Act only applies to property which, when the successor becomes entitled in possession, is *in its then state* actually producing, or at all events capable of producing income, either certain, as contemplated by section 22, or fluctuating, as contemplated by section 26. It is true that the 10th section imposes the duty generally, according to the *value* of the succession. But the 21st section shews that, *except in cases specially provided for*, the calculation is not to proceed upon the

(a) 15 C. B. 251.

absolute value, but upon an annuity to be computed by first ascertaining the *annual value* of the *property*. Now the *annual value* of the *property* must be the same, whether the defendant be, as here, tenant in fee, or merely for life, or for a term of years. It follows that if, in estimating the "annual value," the "prospective value" is, under circumstances like the present, to form the basis of calculation, a tenant for life with power of letting land on building leases, which is not to be exercised till the land comes into the market, would pay a heavy duty upon property from which he might never derive benefit. A tenant for a term of years would be similarly situated. On the other hand, if this land were used for agricultural purposes, and yielded a small rack rent, the 21st section shews that such rent would, after deducting necessary outgoings, form the measure of the "annual value." The "prospective value" would not in such cases enter into the computation. And if not, it is strange that it should be brought into computation where the land is wholly unproductive. It has been argued, however, that, in cases like the present, the period when the duty becomes payable may be, when the enjoyment first becomes beneficial. But the 20th section expressly enacts that, except in the case of prior charges and outstanding interests, the duty is to be paid, "when the successor shall be entitled in possession to his succession, or to the receipt of the income, or profits thereof." An attempt has been made to deduce a general rule from the analogy of certain special provisions. The 21st section shews these provisions to be exceptional. The principal exceptions are, timber, and advowsons. In other cases, where the payment of duty is deferred, it is upon the ground that the whole succession does not, in the first instance, accrue in point of estate. An advowson, if not chargeable under the 24th section, would not, it is sub-

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mitted, be subject to succession duty. Land, which is unproductive, and not in the market, bears a close analogy to an unopened mine. But the inference to be drawn from the 26th section is, that an unopened mine is not liable to the duty. The 39th section is for the successor's benefit. It enables the Commissioners to compound the duty, where the preceding rules might operate with harshness; but it was obviously not intended that this power should be compulsory. The legislature has pointed out no mode of ascertaining the "annual value" by reference to the principal value, except in cases within section 26. Moreover, the "prospective value" must, in every case, be ascertained from valuations which are speculative. As a question of policy it is important, in taxing the subject, to adopt bases of computation which are certain. The defendant's view involves no hardship on the Crown, since, where land is left unproductive in order to obtain a prospective increase, the Crown will, in all cases, get the benefit of the increased value at the period of the next succession.

*The Attorney General*, in reply.—The duty is imposed by section 10, not by section 21. Section 21 only prescribes the mode of ascertaining a successor's interest. It has been argued that, if the defendant's land had yielded a small agricultural rental, that circumstance would have excluded the consideration of all the other circumstances, without which, in cases like the present, the real annual value could not be ascertained. But there is nothing in the 22nd section to warrant such a conclusion. The tenor of the argument for the defendant has been to substitute the words "annual income" in the place of "annual value." If this be their true meaning, it follows as a necessary consequence that a large amount of the most valuable

property in the kingdom will escape taxation, though the object of the legislature was to include all real property. With regard to the 24th section, which relates to advowsons, the true inference from it is, not that advowsons would escape taxation altogether, if not specially provided for, but that they would fall, like other property, within the ordinary rule. If the Court should be of opinion that, when the defendant's title accrued, this succession had no value, the reasonable construction of section 37 would be, that the defendant did not then obtain the whole of his succession.

*Cur. adv. vult.*

The learned Judges having differed in opinion, the following judgments were now delivered.

WILDE, B.—The defendant in this information appears to have succeeded to a plot of land at Liverpool, which was not at the time of his succession devoted to any remunerative purpose. Its immediate vicinity to a large town renders it probable that before long it will be very valuable as building land.

And the question for our determination is, in what manner and on what principle is the succession duty in respect of such land to be assessed? Whether, on the one hand, the actual beneficial value at the time of succession is to be looked at, or whether, on the other hand, it is competent to the Crown to any and what extent to regard the future but proximate, I had almost said “imminent,” increase in value which awaits the land for building purposes. The governing sections of the Act are as follows. By section 10 of the statute every successor is made liable to pay a tax “in respect of every such succession according to the value thereof.” It is not the value of the “property” or “land,” but the value “*of his succession*” which is the object of the

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tax and the criterion of its amount. In the course of the argument in this case various modes have been suggested in which this value should be ascertained. The results obtained are so widely different and the principles of so universal an application, that the importance of arriving at a true determination can hardly be exaggerated. The next important section is section 21. It provides for the mode in which the value of successions to real properties are to be estimated, and it declares that this shall be done through the medium of an annuity.

This annuity once ascertained, the rest of the calculation is easy enough, and, so far as I am aware, admits of no doubt. Now, for calculating this annuity, the section desires us to refer to the "annual value" of the property.

It is to be "an annuity equal to the annual value of the property."

And here it is that the question arises, what is the meaning of the "annual value of the property"? The meaning attached to these words by the Crown officers is as follows: That the land should be valued, taking into consideration not only the rent, profit, or benefit, which it then produces or is capable *then* of producing, but in addition thereto, the future advantages which may attach to it from any cause whatever; such as the advantages of situation (involving building or occupation value), mineral strata, which in future may be worth working, brick earth capable of future productiveness, stone which in future may be quarried, and the like. All these matters should, they say, be brought into due consideration, and a present capital value fixed on that basis.

This capital value so ascertained is to be turned into an annual sum at 3*l*. per cent., which will then represent the "annual value" intended by section 21. So that if a man came to the succession of an acre of land *then* used as arable

land and producing 40s., but which was in the vicinity of a large and increasing town, the "annual value" for taxation purposes would be, not the 40s., but so much in addition as a calculation of the probable future value of the land reduced to an average annual value would add thereto.

But is this the annual value by the section intended? There are several grave objections to such a conclusion.

In the first place, there is no language in the section authorizing the recourse to a calculation of average and the adjustment of a hypothetical annual value based upon expectations, however well founded, of the future. There is no system or method of making such a valuation indicated.

The only words are "annual value," and these without more would seem to mean "actual" "annual value." But moreover it appears that, when the legislature did intend this mode of calculation to be adopted, they have distinctly said so. For in section 26, when it became necessary to provide for the case of manors and opened working mines, whose annual value is said to be fluctuating, the Act by express words provides "that the principle value of such property shall be ascertained, and the annual value thereof shall be considered to be equal to interest at 3l. per cent. on the amount of such principal." This section is very instructive, for we have the legislature providing for an exceptional case the very system which it is now contended may be adopted under section 21 for the common case.

But there is this further objection. The provisions of section 21 declare that the annuity representing the annual value, having been ascertained, should be treated as an annuity "payable during the residue of the successor's life or for any less period during which he should be entitled thereto," and such annuity shall be valued according to the table in the schedule, and the duty charged upon such value.

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The object of taxation, therefore, was the actual benefit derived by the individual and not the property itself.

Each successor in turn is intended to pay a duty proportioned to the duration and extent of his enjoyment of the land, and no more.

Any system of charge therefore which draws into the calculation a prospective and future benefit, uncertain as to the time of its incidence, has the vice of making a tenant for life or a shorter period pay upon the footing of an event which may not occur *in his time*, and for a benefit which may not accrue during his tenancy.

Now, it is urged that if some system is not adopted, which takes account of a value which, though future and uncertain, may, as in the present case, be something more than probable, and near at hand, the result would be that the successor would obtain a benefit in respect of which he would pay no duty. And this is undoubtedly true. And it is the strength of the argument on the part of the Crown. But it is by no means plain that the legislature intended to prevent such a result.

If the question lay between a system which should make a successor pay for a benefit he might never receive, and one under which a successor might possibly receive a benefit for which he never paid, I can well understand that the latter might be the alternative chosen. Moreover, it is to be borne in mind that as the property pays duty afresh as it passes into each successive hand, the Crown will receive duty on the increased value at the next devolution of the property after such value has accrued. And this was probably all that the legislature intended.

But there is another side to the question. Landed property, more especially houses, may fall in value as well as rise. If prospective increase is to find a place in the determination of "annual value," prospective decrease

ought to do the same, and a man coming into possession for life of a row of houses in London, the actual net rental of which was then very high, might claim the right to insist on the probable fall in value of his house property as situate in a quarter then going out of fashion.

It is not easy to conclude that the legislature contemplated these hypothetical bases of value, worked out by calculations both complicated and uncertain, and still less so to conclude that they should have left all this to be conveyed (in a strictly and remarkably well drawn Act) by the simple words "annual value."

The truth is, that anything like exact justice between the Crown and the successor, forcing him on the one hand to pay to the last farthing for all that he receives, and protecting him on the other from paying for anything more than he actually enjoys, can only be obtained by some system which should provide for *the incidence of the tax at the time when the increase or decrease in value takes place*. So that, instead of the succession being dealt with, and its value, for the purpose of taxation, ascertained once for all at the time of the successor becoming entitled, the account would be kept ever open, and the tax would be increased or reduced, *pari passu*, with the rise and fall in the annual value of the succession.

This would attain perfect adjustment of taxation to benefit, but it would be in practice perfectly intolerable.

And the legislature have, as it seems to me wisely, avoided anything of the kind, and have been content to tax improved values in land and the lucrative possession of land used for building in the hands of those succeeding to *land then so used*.

Some attempt was made in the argument to contend that the legislature had in fact provided for this intermittent method of levying the tax, and reference was made to

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section 37 for that purpose, which speaks of a successor who has not “obtained the whole of his succession at the time of the duty becoming payable.” But the learned Solicitor General, whose masterly argument threw all possible light on the intention of these various clauses, hardly ventured to take his stand on this section 37, which, when carefully read, is obviously framed to meet a totally different case.

I am, in the result, clearly of opinion that the words “annual value” mean the *actual present annual value* of the land at the time of the succession.

That such actual annual value must be measured (except in cases where mala fides can be successfully imputed) by the money benefit which the successor annually derives from the land, or which he is capable of deriving from it, in the condition and used for the purposes to which the land is then devoted.

The facts agreed to by both parties in reference to the land in question in this case are very peculiar.

It is difficult to conceive of any land at Liverpool that it was not capable of being used productively for *any purpose* during ten years before Lord Sefton came to his succession, and continued in that state until seven years after his succession, when portions were sold for building.

But with the correctness of these facts we have nothing to do. I am bound to accept them as proved. The result, therefore, of the conclusions which I have above arrived at as applied to this case will be, that, if the land had really no annual value at the time of Lord Sefton’s succession, he is discharged from duty in respect thereof.

MARTIN, B.—This is a question of considerable importance. The late Earl of Sefton died on the 2nd of August, 1855. He was the owner of land in Toxteth Park, Liver-

pool. This land then and for ten years previously had been wholly unoccupied and unproductive, and was incapable of being used productively for agricultural or other purposes, and no income or annual profit had been derived from it. It was not then in demand or marketable as building land, nor capable of being sold or let profitably as such; and it is stated that, by the custom of Liverpool, owners of such land sell it absolutely for building, and do not let it upon long leases or otherwise dispose of it. It is not stated whether the land was of value upon the 2nd of August, 1855, when the defendant, the present Earl, became possessed of it, but it must have been of very great value, for in 1862 he sold part of it at the rate of upwards of 4000*l.* an acre, which is forty times the value of the best agricultural land.

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The question is, whether he is liable to succession duty? and it is of importance; for a great quantity of by far the most valuable land in the kingdom is similarly circumstanced. When noblemen and gentlemen are owners of land in the immediate neighbourhood of large towns, and new streets and buildings come close to it, it is liable to constant and perpetual trespass; people walk over it; carpets are beaten on it; children play on it; and except a wall be built round it (which is frequently of little avail), or constant and perpetual legal proceedings for trespass be kept up, it gets into the condition in which the defendant's land was. The present income is nil, but the land is of enormous value, thousands of pounds per acre more valuable than the very best agricultural land.

The contention is, that the succession to such land is not liable to succession duty. This depends upon the construction of the Succession Duty Act (16 & 17 Vict. c. 51). It may be that the case is one omitted, but I cannot believe it was the deliberate intention of the legislature to relieve such



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land from payment of duty. The Act enacts that the term "succession" shall denote property chargeable with duty, and by section 2, a devolution of property by reason whereof any person shall become beneficially entitled to property, or the income thereof, shall be deemed to confer a "succession." If, therefore, a man becomes beneficially entitled to property although there be no annual income, there is conferred upon him a "succession." Now, the defendant became entitled to the property. It is true that it would not have been wise or prudent in him to have sold it immediately upon his father's death, but, nevertheless, it could have been sold, and many successors to it would, by reason of their pecuniary circumstances, have been compelled to sell it, and it would, in comparison with ordinary land, have produced an enormous money price. The succession to the property was therefore a benefit, and a great one, to the defendant. The 10th section imposes the duty, and enacts that there shall be paid in respect of every succession, according to the value thereof, a duty upon such value. Now, except in the cases specially provided for, as timber by the 23rd section, and advowsons by the 21st, the duty is to be calculated upon the value of an annuity, and there must therefore be an annual sum for the basis of the calculation, and unless one can be attained to, the taxation cannot be effected.

The argument on the part of the defendant was, first, that such property as the present was intended by the legislature not to be subject to the tax; but in this I cannot concur. It was said to be like an unopened mine, which it was said is not to be considered in the value for the taxation; but, I think this is not so. By the 21st section, the interest of the successor to be taxed is the value of an annuity equal to the annual value of the property. Now, suppose land containing coal, which the owner did not think fit to let,

was situated in a district where the landowners generally let their coal at rents, which is very generally the case; I think, in estimating the annual value, the rent which the owner could get for the coal ought to be taken into consideration, although the mere circumstance of there being coal under land in the neighbourhood of which no coal was being worked, might be considered as not materially adding to it. If this were otherwise, the consequence would be that one owner of land, precisely similarly circumstanced, who let his coal, would pay a higher tax than another, who, for his own convenience and possible future benefit, at his own mere will, did not let it. Mines may afford a fluctuating yearly income in two ways. First, to the person actually working the mine, and secondly, to the owner of the mine who does not work it himself; it being a very frequent practice for the owner of land, under which there is a mine, to let it at a minimum rent certain, but to increase according to the quantity of mineral got. I do not think that any inference can be drawn from this, that an unopened mine is to be excluded from the calculation of value under the 21st section. The 26th section was relied upon to shew that this was so, but I do not think it does. The section deals with property of a fluctuating yearly income; and the first instance is a manor which is clearly of that character, the second instance is an opened mine. It was argued that the 22nd and 26th sections shewed that real property to be taxed, except that in respect of which express provision was made, must be capable of yielding yearly income, either not of a fluctuating character or of a fluctuating one. But the 39th section, in my opinion, conclusively shews that it was the intention of the legislature, that all real property, however disposed or circumstanced, should be subject to the tax; and the inference from it seems to me irresistible, that all beneficial succession to real property should be subject to the duty.

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It was secondly contended on behalf of the defendant, what in my opinion is the real difficulty in the case, that the statute has not expressly provided for it. If the 39th section had been framed like the 26th, there would be no difficulty, for the latter provides, first, for an agreement between the Commissioners and the successor; and if this cannot be done, it enacts a very reasonable rule, viz., that the principal value of the property shall be ascertained, and the annual value shall be considered to be three per cent. on the amount of principal value.

The result of the argument is that, in my opinion, the legislature did not intend that property circumstanced like the present should be free from the tax. It would be most unjust and unfair to owners of agricultural or grazing lands, which constitute the great bulk of the land of the kingdom, that a tax should be imposed upon them in respect of land not one hundredth part of the value of the land alleged to be free; and in order to prevent such injustice, I am prepared either to apply the 37th section, and hold this case to be within it, viz., that the defendant did not at the time of his father's death obtain the whole of his succession, and that he is chargeable with duty on the value of the property or benefit from time to time obtained by him, to be calculated according to the mode prescribed by the 26th section, that is, at the rate of three per cent. upon the amount of the sales; or that the word "compound" in the 39th section means to "fix" or "assess," and gives the Commissioners authority to impose a duty, which, of course, must be done in conformity with the spirit of the act of parliament. I am, therefore, of opinion that the Crown is entitled to judgment.


POLLOCK, C. B.—In this case I am of opinion that the defendant is entitled to our judgment; first, because I think, on the true construction of the Act under which the

claim of the Crown is made, actual annual value is the basis on which the succession duty is to be calculated, and not possible or prospective annual value; secondly, because the special provisions made in certain cases, such as timber, trees and wood, advowsons, fines on beneficial leases, and opened mines, afford, in my judgment, strong evidence that such a case as the present was not to be dealt with in the way proposed, without some clause in the Act to authorize it; and, lastly, because, if the principle on which the present claim is made be a sound one, it must apply to cases where the present annual value is less than (prospectively) it will probably become, as well as to cases where it is absolutely nothing; and it is to my mind perfectly clear that the Act was not framed with any such intention.

The real question before us is, what is the meaning of *annual* value in the 21st section? Does it mean present actual annual value, or does it mean the annual value which the owner might *immediately* obtain from it, were he minded to apply it to a different purpose, or the possible prospective value which there is every reason to suppose it will attain in a very few years? I am of opinion that it means present actual annual value. The 23rd section makes a special provision for timber, trees, or wood, which timber is to be paid for when sold. The successor to timber is not bound to sell it; he may (if so minded) allow it to stand as an ornament to his estate till it has lost all value as timber, and then he will pay nothing. The 24th section makes a similar provision as to an advowson. A successor to an advowson is chargeable only for any profit he may make by selling it, or by selling a next presentation; but he is not chargeable on account of the possibility of profit if he does not avail himself of it by disposing of either the advowson or the next presentation. The 25th section provides for fines *on beneficial leases*. The

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26th section gives the rule for manors, opened mines, and other real property of a fluctuating yearly income ; but a successor having valuable mineral property is not bound to open mines or to pay for their value, if for any reason he determines not to open them. When opened and worked they will come into charge as part of the succession, and may have an annual value, or be wholly unproductive. The value of timber, when actually sold, of an advowson turned into "money or money's worth," of a fine on renewing a beneficial lease, of the "income" of "an opened mine"—"after deducting all necessary outgoings"—are easily ascertained. But the possible future demand for land as building land (not at the time of the succession in respect of which the duty is claimed in demand at all, which is the case here) is utterly incapable of present appreciation ; and there are obvious reasons why the fluctuating value of real property should not be an element in fixing the amount of duty to be paid by a successor. If the probable increase in value is to be estimated, the probable decrease ought to be taken into account. If increased duty is to be paid when land rises in value after a successor has obtained possession of it, duty ought to be returned should its value fall. But if the principle of this claim be correct, the successor to a mansion and park, close to a large town, and adapted immediately for building, ought to pay, not according to the fair rental of the estate as it is, but according to the increased value, if it were sold for building land : a claim which I think could not be made, and if made, could not be supported. The proprietor of property in this country has a right to make what reasonable use of it he pleases, and sometimes even an unreasonable use, and he is not bound so to use it as to yield the largest revenue to the government, or to pay taxes as if he did. A landed proprietor, whose park is over the most

valuable mineral property, has a right to say, "I prefer living where my ancestors have lived to obtaining the wealth which opening the mines would afford;" and on a succession to such property, the duty, in my judgment, ought to be calculated on the fair rental which such a residence and park would command, and without any reference to the value of the undisturbed minerals. The last consideration which I shall present is this. According to the principle involved in the present claim, if the proprietor of a large estate did not make the most of it, and exact the largest rent it was capable of affording on a succession, the successor might be called upon to pay according to a valuation to be made, not of what its annual value actually was, but upon that which it might be made to produce: a proposition which I think cannot be supported.

For these reasons I think our judgment ought to be for the defendant.

CHANNELL, B., said. —I was obliged to leave the Court in the course of the argument to attend at Chambers, and consequently heard only a part of Mr. *Mellish's* argument, and no part of the reply for the Crown. Under these circumstances, I take no formal part in the decision of the Court. I have, however, carefully read and considered the judgments prepared by my brother *Martin*, and by the Lord Chief Baron and my brother *Wilde*, and, so far as I can with propriety express an opinion, I agree in the result at which the Lord Chief Baron and my brother *Wilde* have arrived.

Judgment for the defendant.

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To a declaration on a valued time policy, averring a total loss, the defendant pleaded only a plea of fraudulent concealment. — *Held*, that a total loss was not admitted, for if that allegation had been traversed the plaintiff might have recovered as for a partial loss.

On the 23rd September, 1859, a ship having been compelled by sea-damage to put into a port near the Cape of Good Hope, the master had her surveyed, and on the 18th of October, 1859, wrote to the ship's husband at Liverpool describing what had happened, and telling him to give the

underwriters notice. On the 18th November he again wrote describing the damaged state of the ship, and stating that in the opinion of the surveyors she could not go home with a partial repair, but that she would not be worth the amount it would take to repair her. This letter was forwarded to the underwriters. On the 24th November the master executed a notarial act of abandonment, and on the 9th December sold the ship. On the 20th December he again wrote to the ship's husband stating that it would be for the interest of all concerned to abandon and sell, instead of repair, and that he had accordingly sold the ship, and he requested due notice to be given to the underwriters, who were then informed of the sale. The ship would not in fact have been worth the expense of repair. — *Held*, that there was no sufficient notice of abandonment to make a constructive total loss.

THE first count of the declaration stated that the plaintiffs, before and at the time of making the policy of insurance hereinafter mentioned, and thence continually until the 1st of March, 1860, were shipowners, and members together with the defendant and other persons of a society or association, called "The Mutual Marine Insurance Association for the Port of Stockton," and the ship hereinafter mentioned and certain ships of the defendants were from the day of the date and making of the said policy of insurance admitted into and entered in the said Society, and at all times hereinafter mentioned continued to be and were so entered; and the plaintiffs, to wit, on the 1st day of March, A.D. 1859, caused to be made a policy of insurance purporting thereby and containing therein that W. Bulwer and J. King, as well in their own name as for and in the name and names of all and every other person or persons to whom the same did, might, or should appertain, in part or in all, did make assurance and cause them and every of them to be insured, lost or not lost, at and from the meridian of the 1st day of March, 1860, upon the body, tackle, apparel, ordnances, munition, artillery, boat and other furniture of and in the good ship or vessel called the "William Willmett;" and that it should be lawful for the said ship to proceed and sail to

and touch and stay at any port or ports, places whatsoever, without prejudice to that insurance. And that the said ship, &c., for so much as concerned the assured, by agreement between the assured and assurers in that policy, was and should be valued at 2000*l.*—(The declaration then set out the usual clause enumerating “the adventures and perils” insured against; the common memorandum or warranty to be free of average, and the rules of the Association (a): it also stated that the policy was subscribed for 600*l.*, and in consideration that the plaintiffs, at the defendant’s request, paid 3*s.* per cent. on the said sum of 600*l.* the defendant became an insurer to the plaintiffs of his proportion of the said sum of 600*l.*, to wit, 60*l.*)—Averments: that during the said space of twelve calendar months, and during the continuance of the risk insured against, the said ship was by the force and violence of the winds and waves and by the perils of the seas damaged beyond 3 per cent. and wholly lost; and at the time of the said loss the said ship remained and was insured in the said sum of 600*l.* by the said Association for the period and on the terms of the said policy mentioned; and all conditions were fulfilled, and all things happened, and all times elapsed, to entitle the plaintiff to be indemnified for and against the said loss, according to the said policy, and to payment by the defendant of his proportion, according to the said policy and rules and regu-

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(a) Rule 13 was as follows:—  
 “If any ship insured in these Associations shall cause, do, or sustain damage of any nature or kind whatsoever, or shall be seized or confiscated, the owner shall, as early as circumstances will possibly permit, apprise the secretary thereof with every particular respecting such claim; and shall when required produce protest and other necessary docu-

ments; and such owner shall not without the sanction of the committee (unless his ship be in a foreign port) commence any repairs except such as may be deemed necessary for the immediate safety of the ship; or settle or compromise any disputes about any claim, or prosecute or defend any action or suit in relation thereto.”



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lations, of the said sum of 600*l.*, to wit, the sum of 60*l.*—  
 Breach: non-payment.

'The second count alleged a refusal by the defendant to have the loss settled by a committee according to the rules and regulations.

Plea.—That the defendant became an insurer to and promised the plaintiffs as in the declaration mentioned, after the said ship or vessel had sailed and whilst she was upon a certain voyage on the high seas; and that he became such insurer and so promised as aforesaid through and by means of the fraudulent concealment by the plaintiffs from the defendant of certain facts and information which, at the time of the defendant becoming such insurer and so promising as aforesaid, were known to the plaintiffs, and were then material to be known by and ought to have been communicated to the defendant, but of which the defendant had no notice or knowledge, to wit, that at the time when the said ship or vessel so sailed upon the said voyage as aforesaid she was unseaworthy; and before she sailed upon such voyage she had been surveyed by certain surveyors of ships appointed by the said committee of management of Lloyd's registry of ships, and had thereupon been reported by such surveyor to be, and in fact then was, in such a condition as not to be entitled to any character upon the said registry, and remained and was in such condition from the time of such survey until and at the time of her sailing upon the said voyage as aforesaid; and that at the time of the defendant becoming such insurer and so promising as aforesaid the said ship or vessel was unseaworthy.—Issue thereon.

At the trial, before *Keating*, J., at the Liverpool Spring Assizes, 1863, the following facts (*a*) appeared. Throughout

(*a*) The facts here stated are those agreed upon by counsel on appeal to the Exchequer Chamber.

the year 1859 the plaintiffs and the defendant and other persons were members of a Marine Insurance Club, called "The Mutual Marine Insurance Association for Stockton," and had ships entered in the club, and the plaintiffs' ship, the "William Willmetts," was so entered. On the 1st day of March, 1859, the plaintiffs caused themselves to be insured in the club by a policy in the usual form for 600*l*. from that date to the 1st March, 1860, on the "William Willmetts," valued at 2000*l*. By words at the foot of the policy it was agreed that the rules of the club should form part of it. The policy was underwritten on behalf of the defendant and the other members of the club, with their authority each to bear his proportion of the policy according to the sums mutually insured by them.

In May, 1859, the ship "William Willmetts," being seaworthy, set sail with a cargo of teak on a voyage from Moulmein, in India, to Falmouth with the plaintiff King for her master. The plaintiff Bulmer, residing at Middlesborough, was the ship's husband. On the 23rd of September, 1859, she had sustained such damage from the perils insured against that it was necessary to make for Simon's Bay, near the Cape of Good Hope, where the ship was, on the 27th September, accordingly brought to anchor.

Next day plaintiff King made a notarial protest, and the ship was, on the same day, surveyed by proper surveyors. The surveyors recommended that the vessel should forthwith be lightened by discharging a portion of her cargo and trimmed, so as to bring the leak (then 3 or 4 feet under water) well out for further examination or repair. By the next mail from the Cape to England, viz., on the 18th October, 1859, plaintiff King wrote to plaintiff Bulmer, describing what had happened, and telling him to give the club notice of the accident to the ship. The letter was accordingly, on the 28th November, 1859, for-

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warded by Bulmer to and received by the club of the defendant. Captain King's letter contains this passage, "I am using my best exertions to get the ship made tight and on her voyage again in the cheapest manner, and in the shortest time possible. Everything is very high in price, and it will be difficult to keep an average bill low."

Another survey was made on the 23rd October, 1859, and the same surveyors, after mentioning some damage received by the ship, recommended that she should be still more lightened in order to enable them to better examine the ship, and to recommend the repairs to be effected to enable the vessel to proceed to sea in a fit and proper condition.

The third survey was made on the 5th November, 1859, and the same surveyors made a report stating particulars of the damage to and the state of the ship, and giving a specification of the repairs which they recommended and considered necessary.

By the next mail to England the plaintiff King sent to plaintiff Bulmer at Middlesborough the following letter, stating the facts:—

" Simon's Bay, Cape of Good Hope.

" Dear Brother,

" Nov. 18th, 1859.

" I wrote to you on the 18th ult., and again on the 1st, detailing our situation here. Since that I have had a survey on the state of the ship, the cargo being nearly all out. I find the vessel very much shaken and damaged, the surveyors recommend heaving down thoroughly, caulking most of the fastenings of both hold and deck; beams replaced, as they are all started; 5 new hold beams and 3 deck beams; the hooks forward to be replaced, stem brought to its place again, and fastened with 6 iron knees outside and screw bolts; all new trenails from mainmast forward. The sea has struck the ship with such force that

it has sent her completely out of shape, and started almost every fastening. Many of the trenails are broken in halves; 2 or 3 of the hold beams iron knees are broken, and the rudder is all to pieces. The seams in the top have opened considerably, and the fastenings all started; in fact, the whole of the port side works in and out  $1\frac{1}{2}$  inches, and the surveyors very much doubt whether or not she would bear heaving down at all, as there is always a swell on more or less. There are 6 or 7 stanchions gone on deck, and some bulwarks, and as there is no zinc here she would have to be sheathed with Muntz's metal. In addition to the above there are some minor things to be replaced to effect those repairs. I advertised for tenders, and the following is the amount each party will undertake the job for:—

“ Mr. G. R. Budge . . . . £2785 0 0

“ Messrs. Bartlett & Co., about . . . 2234 0 0

“ Mr. C. Robinson . . . . . 2288 15 0

The two last sums do not include iron work. These tenders I consider very high, but find the work cannot be done for less in this place. Under these circumstances I deemed it best to consult with the surveyors upon the above tenders, and they have given it as their opinion that the ship could not go home with a partial repair, but that she would not be worth the amount it would take to repair her. I have, in consequence of this, asked the opinion of the highest legal authority here as to what is best to be done, but am unable to get the opinion by this mail. My own opinion is that it will be better for the interest of all parties to sell the ship and send the cargo on, especially as experience has proved that the repairs of a ship here usually exceed the estimates by about 10% per cent. Give the different clubs notice of our position, and trusting you are all well,

“ I remain, &c.,

“ J. R. King, Bk. ‘ William Wilmett ’ of Stockton.

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“ I will write you by the first opportunity after I receive the opinion ; this mail leaves Cape Town on the 20th. I enclose the card of the firm who are acting as my agents.

“ J. R. K.”

This letter plaintiff Bulmer forwarded to the club immediately on receiving it, viz. on the 27th December, 1859, and it was received by them in the course of post. The letter from Captain King to Bulmer on the 1st November, 1859, mentioned in Captain King's letter of the 18th of November, 1859, was not put in evidence by the plaintiffs, nor did its contents appear.

On the 21st of November the Attorney General of the Cape of Good Hope wrote that in his opinion it was the duty of the captain, on the assumption that the surveyors considered that the costs of the repairs would clearly exceed the repaired value, to sell at once, reporting the abandonment and sale to the owners, in order that they might give notice of abandonment ; and he added as his opinion that, the calamity having occurred at such a distance, the master was turned by the emergency into an agent for the underwriters to sell without giving them an election to repair.

The ship's repaired value would have been clearly less than the costs of the repairs necessary, according to the evidence of the surveyors, to make the ship seaworthy, or capable of continuing the voyage with cargo or in ballast ; and the said surveyors, on the 14th of November, 1859, expressed their judgment that the best course for all concerned in the ship would be to abandon her, and sell her for the benefit of whomsoever the same might concern. That judgment was declared by the surveyors in a declaration signed by them, and was attested by a notarial act, signed by a notary public, and dated the 24th November, 1859.

The plaintiff King, as master of the "William Willmetts," accordingly, on the 24th day of November, 1859, by a notarial act of abandonment, purported to abandon, cede, and lease all and every the right, title, estate, property, profit, and interest, claim and demand whatsoever of and belonging to the owners of the ship "William Willmetts," of and in the said ship, her tackle, apparel, and furniture, to the use of the several underwriters of the policies effected on the ship and cargo, he holding the insurers bound to pay the whole sums insured, and putting the underwriters in the place of the owners, giving them, the underwriters, all advantage which might arise from the sale of the ship.

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On the 9th of December, in the year of our Lord 1859, the plaintiff King sold the ship for the best price which could be obtained by public auction, and the net proceeds of the sale was the sum of 124*l.* 3*s.* 7*d.*, which sum had been received by the captain before, but had not been paid over or accounted for to the underwriters up to the time of the trial.

On the 20th December, 1859, the plaintiff King wrote to the plaintiff Bulmer the following letter, and sent it by the next mail, the mails from the Cape being monthly:—

“Cape Town, Cape of Good Hope.

“Dear Brother,

“December 20th, 1859.

“I beg to enclose duplicate of my letter under date the 18th ult. per last mail, and I now have to advise, having obtained the opinion of the first authorities in the place, as to the best course to be pursued in the matter of the ‘William Willmetts,’ and which, being in conformity with my own, that it would be for the interest of all concerned to abandon and sell, instead of repair, I accordingly sold the ship and apparel by public auction on the 9th instant, the whole realizing about 280*l.* gross.

“I then advertized for a vessel to carry the cargo to its

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destination, and had three offers, the lowest I was unwillingly obliged to reject as the vessel would not have carried more than 230 loads. I therefore accepted the second at 35*s.* in full, this vessel being the Kate Swanton, Captain Carrington.

“The Kate Swanton will be ready to receive cargo next week. I shall superintend the loading and forwarding, which I have no doubt will be completed by the time the next mail steamer leaves ; by which opportunity I purpose taking passage myself, and will bring all documents relating to this unfortunate affair with me.

“I duly advise the shippers at Moulmein of the disaster to my ship, and the forwarding of the cargo in another bottom.

“I am doing all I can for the interest concerned.

“Yours, &c.,

“Give the underwriters due notice. “J. R. King.”

“J. R. K.”

Directly the plaintiff Bulmer received this letter he wrote to the secretary of the club the following letter:—

“To John Smith,

“60, Albert-road, Middlesboro', 30th January, 1860.

“Respected Sir,

“I have this day received another letter from Captain King, dated Cape Town, 20th of December, 1850, stating that he had sold the ‘William Willmetts’ by public auction, on the 9th of that month, for the benefit of all concerned, and that she had realized 280*l.* gross, and that he had forwarded the cargo in another ship. If you wish it I will forward you the letter. Captain King would leave on the 20th of this month for England, where he hopes to arrive by the 7th of March, and he will bring all the necessary documents with him.

“Respectfully, W. Bulmer.”

This letter (of the 30th of January) was duly received by the secretary.

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The plaintiff Bulmer, on his examination, stated, in general terms, that he duly forwarded Captain King's letters to the secretary of the club, but did not give any specific evidence as to the precise time when he forwarded the letter of the 20th of December, 1859. He also stated that the original letters of Captain King from the Cape were returned to him by the secretary.

The secretary resided at Stocton, and the usual mode of communication between them was by post.

The defendants failed to prove, and abandoned their plea, and admitted that the plaintiffs were entitled to the verdict, as for a partial loss, but contended that a total loss was not admitted on the pleadings, and that due abandonment and notice were necessary in order to entitle the plaintiffs to recover, as for a total loss, and that such abandonment had not taken place or notice been given.

The learned Judge ruled; first, that a total loss was admitted on the record; and, secondly, that, if abandonment and notice of abandonment were necessary, there was sufficient evidence thereof, reserving leave to the defendant to move on these points; and the learned Judge directed the verdict to be entered for the plaintiffs, as for a total loss, subject to be reduced to a partial loss on the points reserved, the amount to be ascertained by reference to an average adjuster.

*E. James*, in last Easter Term (April 18), obtained a rule to shew cause why the verdict found for the plaintiffs, as for a total loss, should not be set aside and a verdict entered as for a partial and average loss only; or why a new trial should not be had for misdirection, on the ground in either case; first, that there was no evidence of a total loss either



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absolute or constructive; second, that the defendant was not precluded from contending that the loss was a partial or average one only; against which

*Temple* and *Hindmarch* (with whom was *T. E. Chitty*) shewed cause in last Trinity Term (a).—First, upon these pleadings a total loss is admitted. The declaration contains an averment that “the said ship was by force and violence of the winds and waves and by the perils of the seas damaged beyond 3 per cent. and *wholly lost* :” the only plea is fraudulent concealment of unseaworthiness. The defendant relies on *Gardiner v. Croasdale* (b), where it was held that in an action for a total loss the plaintiff might recover for a partial loss. Lord *Manfield* there said: “As to the effect of a judgment by default. The defendant could not have been hurt by a judgment by default. For the plaintiff could not have recovered, even upon a writ of inquiry, any greater damages than the plaintiff could prove, to the jury sworn to assess them, that he had actually suffered.” But it does not appear from the report of that case in *Burrow* whether the policy was an open or a valued policy; and it would seem from the report in *W. Blackstone* (c) that it was an open policy. This being the case of a valued policy, falls within the principle of the decision in *Thellusson v. Fletcher* (d), that where a policy contains a stipulation that it shall be sufficient proof of interest, if there is a judgment by default, the plaintiff, on a writ of inquiry, need only prove the defendant’s subscription to the policy, without giving any evidence of interest. [*Bramwell*, B.—If the allegation of a total loss had been traversed, the issue would have been distributable and the

(a) May 25. Before *Pollock*,  
 C. B., *Bramwell*, B., *Channell*, B.,  
 and *Wilde*, B.

(b) 2 Burr. 904.  
 (c) 1 W. Black, 198.  
 (d) 1 Doug. 315.

plaintiff might have recovered on proof of a partial loss: *Paterson v. Harris* (a).] In an action on a policy of insurance, the plea of non-assumpsit only operates as a denial of the subscription to the alleged policy by the defendant, but not of the interest, of the commencement of the risk, or of the alleged compliance with warranties: Plead. Reg. Gen. H. T. 1853, r. 6 (b). Here the plea confesses the matters alleged in the declaration, and seeks to avoid them on the ground of fraud. [*Wilde*, B.—An allegation of total loss includes an allegation of partial loss.] There is no authority that, because a pleading is divisible, it is not admitted if not traversed. A judgment by default in an action on a valued policy confesses the plaintiff's title to recover, and the amount of the damages is fixed by the policy. It is only where a total loss is denied, and the assured has merely sustained a partial loss, that he is bound to give evidence of damage, under a valued policy; 2 Wms. Saund. 202, note. Formerly, when money was paid into Court in an action on a valued policy, the plea alleged that there were no damages ultra, which was in effect a denial of a total loss: 3 Chit. Plead. 104, 7th ed. Now, the allegation in the plea of payment into Court prescribed by the 71st section of the Common Law Procedure Act, 1852, "that the said sum is enough to satisfy the claim of the plaintiff in respect of the matter herein pleaded to," operates as a traverse of a total loss. Moreover, the declaration alleges that all things have happened to entitle the plaintiff to recover as for a total loss, and that is not traversed.

Secondly, the case of *Cambridge v. Anderton* (c) is an authority that, where a ship is so much injured by perils of the sea as not to be repairable without an expense exceeding her value when repaired, the assured may recover

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(a) 2 B. &amp; S. 814.

(b) 1 E. &amp; B. App. lxxix.

(c) 2 B. &amp; C. 691.

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for a total loss without giving notice of abandonment. But assuming that notice of abandonment was necessary, sufficient notice was in fact given. On the 18th October, 1859, the plaintiff wrote to the ship's husband describing what had happened, and telling him to give the underwriters notice. On the 18th November, 1859, the master again wrote to the ship's husband, describing the damaged state of the ship, and stating that in the opinion of the surveyors she could not go home with a partial repair; but that she would not be worth the amount it would take to repair her. This letter was forwarded to the club as soon as received. On the 20th December, 1859, the master again wrote to the ship's husband stating that it would be for the interest of all concerned to abandon and sell, instead of repair, and that he had accordingly sold the ship, and he requests due notice to be given to the underwriters. On the 30th January, 1860, upon the receipt of that letter, the ship's husband wrote to the secretary of the club informing him that the ship was sold for the benefit of all concerned. There was also a notarial act of abandonment. In order to ascertain whether there has been a constructive total loss, it is necessary to consider what a prudent uninsured owner would have done with a vessel in the same damaged state. No prudent uninsured owner would have repaired this ship, for, when repaired, she would not have been worth the money expended on her. The master was, therefore, justified in selling her for the benefit of the underwriters, and the plaintiff is entitled to recover, as for a total loss, the value stated in the policy: *Irving v. Manning* (a).

*E. James, Kemplay and C. Russell*, in support of the rule.—First, this action is brought to recover unliquidated

(a) 1 H. L. 287.

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damages, and there is no admission on the pleadings of a total loss. The plea on the record is by way of confession and avoidance, but it only admits a loss to the extent to which the plaintiffs would have been bound to prove it, if the defendant had traversed the allegations of loss in the declaration. It is clearly settled that, on a declaration alleging a total loss, a plaintiff will succeed upon proving a partial loss only: *Gardiner v. Croasdale* (a). Therefore, here, a partial loss to some extent by the perils insured against is all that is admitted. The allegation in the declaration that, during the continuance of the risk, the ship was by perils insured against "damaged beyond 34 per cent.," is sufficient without alleging that it was "wholly lost." The latter allegation is not traversable. [*Wilde, B.*—The defendant's argument proceeds on the assumption that there is merely a progression of damages. But the question is, whether the declaration does not involve two distinct claims.] If so, this mode of declaring would be informal, but it has never been so regarded. The underwriter contracts to indemnify the assured against loss from the perils insured against, and the amount of the loss goes merely to the damages. [*Wilde, B.*—According as the loss is partial or total, there is an essential distinction in the *mode* in which the matter is worked out, and in the *result*.] Still, the cause of action is the same. In *Gardiner v. Croasdale* (a), Lord *Mansfield* expressly says, upon the question of total or partial loss, "That is a question more applicable to the quantity of the damages, than to the ground of the action. The ground of the action is the same, whether the loss be partial or total: both are perils within the policy." And the decision proceeded on that ground. The present case may be treated as if judgment had gone by default. A

(a) 2 Burr. 904: S. C. 1 W. Black, 198.

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judgment by default admits no more than a payment into Court. But an admission by payment into Court *operates only to the extent of the payment*: Arnould on Insurance, vol. 2, p. 1297, 2nd ed. The rule there laid down is, that “by paying money into Court, the defendant admits that the plaintiffs are entitled to maintain their action on the policy *to the amount of the sum so paid in*: but he admits nothing more. He does not, by paying money into Court, vary the construction and import of the policy, so as to entitle the plaintiff to recover *beyond that extent*. . . . . Thus in an action on a policy, where the declaration averred a *total loss by capture*, payment into Court of 30 per cent. was held to admit that the loss was *by capture*; but not to be an admission of the *totality* of the loss, or of anything being due in respect thereof beyond 30 per cent. on the value in the policy.” In the case cited, *Rucker v. Palsgrave* (a), the policy was valued. In *Lindsay v. Leathley* (b), where, to a declaration on a *valued* policy for a *total* loss claiming 200*l.*, the defendant pleaded payment of 10*l.* 10*s.* into Court, it was held no admission of a loss through perils of the seas beyond that amount. The averment of no damages *ultra*, which the plea of payment into Court formerly contained, cannot be regarded as an informal traverse of a total loss. Moreover, such a traverse, if pleaded, would be vicious, as a plea to the damages. The circumstance that this is a valued policy makes no difference. The contract, being essentially one of indemnity against loss, bears no analogy to a contract by which a sum certain is payable in a given event, as in the case of a life policy. If the insurance were against *total loss only*, the case might be different. *Thellusson v. Fletcher* (c) is plainly distinguishable. There

(a) 1 Taunt. 419; S. C., 1 Camp. 556.

(b) 2 F. & F. 696.

(c) 1 Doug. 315.

the insurance was upon goods on board a foreign ship, and the policy was a wager policy not illegal within 19 Geo. 2, c. 37. The contract, therefore, was not one of indemnity. But the only effect of a valued policy is to fix the amount of the plaintiff's interest, as if the parties had admitted it at the trial. In the event of a loss, two elements have to be taken into account in ascertaining the damages, viz., the extent of the loss, and the amount of the plaintiff's interest in the loss: *Irving v. Manning* (a). In the case of a valued policy, one of these elements is, in the absence of fraud, admitted, but the other element remains unascertained. The jury must in each case assess the damages.—They also referred to Arnould on Insurance, vol. 1, p. 358, 2nd ed.; *Foley v. Tabor* (b), *Goram v. Sweeting* (c); *Nantes v. Thompson* (d); *Cousins v. Nantes* (e).

Secondly, to entitle the plaintiffs to treat the loss as total, notice of abandonment was necessary. There was no such urgent necessity to sell as to render the sale by the captain lawful as against the insurers: *Knight v. Faith* (f). There is no evidence of notice of abandonment. The letters of the master only shew an intention on his part to abandon. But the owners in England, instead of acting upon these letters by giving notice, send them without comment to the underwriters. A notice of abandonment, to bind underwriters, must be clear and unequivocal: *Par-meter v. Todhunter* (g). Lord *Ellenborough* there said, that the word "abandon" should be used to render the abandonment effectual.

Thirdly, if the circumstance of the master's letters having been transmitted to the underwriters can be held to amount

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(a) 1 H. L. 287.

(b) 2 F. & F. 663.

(c) 2 Wms. Saund. 202 h, note p.

(d) 2 East, 385.

(e) 3 Taunt. 513.

(f) 15 Q. B. 649.

(g) 1 Camp. 541.

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to an abandonment, such abandonment was too late. The assured is, no doubt, allowed time to ascertain the facts. But, when once the facts are ascertained, he must exercise his election within a reasonable time, otherwise it will be presumed that he has elected not to abandon: *Gernon v. The Royal Exchange Assurance* (a); *Mitchell v. Edie* (b). He ought not to lie by and await a new turn of events, since that would defeat the primary object of the rule, which is to give the underwriter the earliest opportunity of obtaining as much benefit as possible from any part of the property that may still be of value: *Roux v. Salvador* (c). Here the master had ascertained all the necessary facts, and communicated them to the owners in England, long before any mention was made of an abandonment.

*Cur. adv. vult.*

BRAMWELL, B., now said.—This was an action upon a valued policy. The declaration contained the ordinary allegation of loss, which was not traversed, the only plea on the record being one of fraudulent concealment.

The first question is, whether such a plea admits a total loss. We are of opinion that it does not, even in the case of a valued policy. By not traversing an allegation in the declaration, a plea admits no more than the plaintiff is bound to prove where the allegation is traversed. If the allegation of total loss had been traversed here, the plaintiff would have been entitled to recover upon proof of a partial loss; consequently, a partial loss only is admitted.

The other question in the case is, whether there was evidence of abandonment. We think not. The assured appear to have acted with fairness, but undoubtedly they acted in such a way as not to bind themselves by any

(a) 6 Taunt. 383.

(b) 1 T. R. 608.

(c) 3 B. N. C. 266, 286.

intimation of an abandonment, and we are of opinion that the underwriters were not bound. In fact there was no abandonment.

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The rule must therefore be absolute to enter the verdict as for a partial or average loss only.

Rule absolute accordingly. The loss to be ascertained by an arbitrator.

## IN THE EXCHEQUER CHAMBER.

(*Error from the Court of Exchequer.*)

Cox and Others v. THE LORD MAYOR, ALDERMEN, and  
COMMON COUNCILLORS OF THE CITY OF LONDON.

July 4.

THIS was a proceeding in error upon the judgment of the Court of Exchequer for the plaintiff on demurrer to a plea and replication in prohibition. The pleadings are fully set forth in the report of the case in the Court below: 1 H. & C. 338.

Sir F. Kelly (with whom was C. Pollock) argued for the defendants (a).—The first question is, not whether the Lord


A writ of foreign attachment from the Lord Mayor's Court of the city of London was served within the city on the garnishee, who thereupon applied to a superior Court for a prohibition on the ground of want of jurisdiction, when it appeared by the pleadings that none of the parties were citizens or resident in the city, and neither the original debt nor that due from the garnishee accrued within the city.—*Held*, in the Exchequer Chamber; first, that the garnishee was entitled to a writ of prohibition and was not bound to appear in the Lord Mayor's Court and there plead the want of jurisdiction, assuming he could plead such a plea.

Secondly, that the writ ought to prohibit the garnishment only, as the 20 & 21 Vict. c. clvii. restrained the defendant in the suit from objecting to the jurisdiction of the Lord Mayor's Court, except by plea in that Court.

*Quere*: whether a garnishee in the Lord Mayor's Court can plead any other plea than "nil habet."

(a) June 17 and 18. Before Wightman, J., Williams, J., Crompton, J., Willes, J., and Blackburn, J.



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Mayor's Court has jurisdiction where the cause of action has not arisen within the city of London, and neither the plaintiff, the defendant, or the garnishee reside within it, but whether upon a plaint being levied in that Court, the plaintiff has not a right to resort to the process of foreign attachment, unless the defendant or the garnishee appear in Court and plead the want of jurisdiction. When that appears, either by the plea of defendant or the garnishee, a superior Court may issue a prohibition, but not before. The proceeding by foreign attachment was part of the Roman law, and still exists in France, Scotland, and several cities in England: Pulling's Customs of London, p. 188. Its object is not to compel payment of a debt but to enforce an appearance. The garnishee is not prejudiced, because he owes the money. [*Wightman, J.*—His creditor may not call upon him to pay so soon. *Crompton, J.*—I have always understood that, if the want of jurisdiction appears by affidavit, a prohibition may issue.] Where the want of jurisdiction appears on the face of the proceedings, for instance, where an inferior Court, having no jurisdiction, entertains a plaint respecting land, a prohibition may at once issue, but where the want of jurisdiction is not apparent on the face of the proceedings, the superior Court cannot take cognizance of it unless it is raised by plea. In Bacon's Abridg. "Prohibition" (K.), it is said:—"In all cases where inferior Courts assume a jurisdiction, or hold plea of a matter not arising within their limits, the party hath his remedy, and may stay their proceedings by prohibition. But such prohibition can only regularly be obtained by its appearing, on oath made, that the fact did arise out of the jurisdiction and that the defendant tendered a foreign plea, which was refused." In *Coke v. Licence* (a), "a motion was made for a prohibition to be directed to the Sheriffs' Court in Bristol,

(a) 1 Ld. Raym. 346.

upon suggestion that causes of action arising out of the jurisdiction of the Sheriffs' Court ought not to be sued there. And this motion was made on behalf of the defendant in the action before he had appeared, to stay the proceedings of the Court, who proceeded to attach his goods in the hands of a garnishee. Sir *B. Shower* opposed the motion, because the defendant could not pray a prohibition upon suggestion of a matter which he could not plead. Now here he could not plead this before appearance, and therefore he ought not to make such a motion before appearance. And per *Holt*, C. J., A man shall not plead to the jurisdiction until he appear; but if the original cause of action arose out of the jurisdiction of the Court, the garnishee may plead it, and of that opinion was *Hale*, C. J. But if it was debt upon a simple contract, it is attachable where the person of the debtor is:" Bacon's Abridg. "Prohibition" (K). "A prohibition cannot arbitrarily issue, nor upon any but the most solid and substantial grounds:" per *Eyre*, C. J., in *Home v. Earl Camden* (a). Where a declaration alleges that the cause of action arose within the jurisdiction of the inferior Court, when in fact it did not, if the defendant omit to plead the want of jurisdiction he is estopped from afterwards raising the objection: *Mendyke v. Stint* (b), *Lucking v. Denning* (c). Two *Anonymous* Cases in Modern Reports (d) also shew that the want of jurisdiction must be pleaded. In the latter, "*Holt*, C. J., and all the Court agreed unanimously, that if an inferior Court has jurisdiction over the cause of action, no prohibition ought to go upon a suggestion that the cause of action arose out of the jurisdiction, but you ought to plead to the jurisdiction, and if they refuse such plea then move for a prohibition. And *Holt*,

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(a) 2 H. Black. 533.

(b) 2 Mod. 272.

(c) 1 Salk. 201.

(d) 11 Mod. 70, Case 107; id.  
132, Case 187.

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C. J., said, there have been cases to the contrary, but the law is not settled otherwise; and if a person plead in chief he shall never assign this for error, if such inferior Court have jurisdiction of the thing." [*Blackburn, J.*—Is not that merely another report of *Lucking v. Denning* (a)? *Williams, J.*—The principle of that decision is, that the superior Court will not presume that the inferior Court has not done its duty. Here the difficulty is that the mischief is accomplished before the time for pleading to the jurisdiction arises. *Crompton, J.*—Can it be a good custom to issue an attachment to compel an appearance to an action over which the Court has no jurisdiction?] The doctrine laid down in *Tranter v. Watson* (b) has never been questioned, that a prohibition will not be granted until the defendant has appeared. [*Blackburn, J.*—In Com. Dig. "Courts" (P. 15), it is said that a "prohibition goes before the action commenced. So, upon an affidavit of the fact, he shall have a prohibition without pleading to the jurisdiction." *Willes, J.*—In an *Anonymous Case* in *Ventris's Reports* (c), "a prohibition was prayed to a suit for tithes upon the suggestion that the lands out of which they were demanded lay out of the parish, and the bounds of parishes are triable at the common law. But the Court denied the prohibition, because it did not appear that a plea thereof had been offered in the Ecclesiastical Court." But there the Ecclesiastical Court had jurisdiction over the subject-matter, and the question was one of fact, which might be tried in that Court. Lord *Coke*, in his Comment on *Articuli Cleri* (2 Inst. 602), says, that "prohibitions by law are to be granted at any time;" and the distinction is obvious between cases where a superior Court in its discretion will at once award a prohibition, and where it will not interfere until the defect of jurisdiction appears on the record.] No doubt, there are cases where the

(a) 1 Salk. 201.

(b) 2 Ld. Raym. 931.

(c) 1 Vent. 335.

inferior Court has jurisdiction over the subject-matter, but in the course of the proceedings some question has arisen, such as the construction of a statute, which it is not competent for them to decide; but in general it is not a matter of discretion whether the superior Court will interfere before plea. [*Willes, J.*—It would seem from the text books that a garnishee can only plead “nil habet.”] There is the authority of Lord *Holt* in *Coke v. Licence* (a) that a garnishee may plead the want of jurisdiction; and in *Masters v. Lewis* (b) it is laid down that a garnishee may plead whatever the defendant might have pleaded. In the judgment of the Court below it is said that it is contrary to natural justice that the defendant should have no notice of the proceedings; but *Magrath v. Hardy* (c) is an authority that notice is not necessary; indeed, it would enable the defendant to remove his money, and defeat the very object of the garnishment. The custom is recognised in the 20 & 21 Vict. c. clvii. By section 15, “no defendant shall be permitted to object to the jurisdiction of the Court in or by any proceeding whatsoever, except by plea;” and it is not unreasonable that the same restriction should apply to the garnishee. [*Wightman, J.*, referred to *Andrews v. Clerke* (d).] There the garnishee pleaded that the debt due from him to the defendant arose out of the jurisdiction; and all that the Court decided was that, admitting the plea to be good, it was pleaded too late. [*Blackburn, J.*—In *Westoby v. Day* (e) Lord *Campbell* said that the garnishee has no means of contesting the debt, except by appearing and putting in bail to the original action.] In *Wadsworth v. The Queen of Spain* (f) and *De Haber v. The Queen of Portugal* (g), the want of jurisdiction was apparent on the face of the pro-

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(a) 1 *Ld. Raym.* 346.(b) *Id.* 56.(c) 6 *Scott*, 627.(d) *Carth.* 25.(e) 2 *E. & B.* 605. 620.(f) 17 *Q. B.* 171.(g) *Id.* 196.

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ceedings, for it appeared that the defendants, who were foreign Sovereigns, were charged with liability in that character. [*Willes, J.*—The law on that subject is laid down by Lord *Langdale, M. R.*, in *The Duke of Brunswick v. The King of Hanover (a)*.]

Secondly, the custom is good and valid. The plaintiff is only taking steps to compel the appearance of the defendant, and upon his appearance being perfected according to the custom the attachment and proceedings thereon will become void. The custom was certified by *Starkie, Recorder*, in the reign of Edward the 4th (*b*), and has ever since prevailed. The fact that the cause of action did not arise within the city, does not render the proceedings unreasonable, or deprive the Court of its right to issue process of foreign attachment. The fact that the garnishment debt did not arise within the city does not prevent the plaintiff from proceeding to enforce an appearance. The Lord Mayor's Court, which is the same as the Court of Hustings, has existed from the time of Edward the Confessor: *Mereweather & Stephens' History of Boroughs*, p. 285; 4 Inst. cap. 50. It must have existed before the *Aula Regis*, or any of the superior Courts of law. The privileges and customs of the citizens of London have been confirmed by charter, commencing with the reign of William the Conqueror. They are recognised in *Magna Charta*, and are expressly preserved by the 2 Wm. & M. sess. 1, c. 8, s. 3. That Act has, therefore, confirmed the custom as certified by *Starkie, Recorder*. In 1 Roll. Abridg. "Customs de London" (K.) 4, this custom is stated, without any qualification as to the cause of action arising, or the parties residing, within the city of London: *Harington v. Macmorris (c)* and *Banks v. Self (d)* are authorities that those matters are not necessary to


(a) 6 Beav. 1.

(c) 5 Taunt. 228.

(b) *Bowser v. Collins*, Mich.  
 22 Edw. 4, pl. 11 [B].

(d) 5 Taunt. 234, note.

confer jurisdiction. The principles on which a foreign attachment proceeds are approved of in *The North Western Railway Company v. Lindsay* (a).

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*Montagu Chambers* and *Griffiths* appeared for the plaintiff, but the Court stated that they would consider whether it was necessary to hear them.

*Cur. adv. vult.*

The judgment of the Court was now delivered by

CROMPTON, J.—The question argued before us in this case was, whether, in the present state of the proceedings in a suit in the Lord Mayor's Court, a prohibition ought to go to prevent that Court from proceeding in a garnishment against Cox and others, the plaintiffs in prohibition. It appeared on the pleadings in prohibition that the cause of action in the original suit in the Lord Mayor's Court, of *Buckmaster v. Farquharson*, arose out of the jurisdiction of the City Court, and that that Court was proceeding with the garnishment. It was not denied by the learned counsel who argued before us that, if the objection were rightly taken at what he alleged to be the proper stage and in the proper manner, the City Court had no jurisdiction to proceed with the garnishment in question; but it was said that the garnishee could only have relief by appearing and pleading. Many cases were cited before us to shew that the Courts have refused to grant writs of prohibition on motion where the question of the cause of action being within or without the jurisdiction might be raised on plea. The Courts may very properly, in the exercise of their legal discretion, refuse a prohibition where the question, being one of fact, seems proper for the decision of the

(a) 3 Macq. 99.

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inferior Court, and where there is no reason to suppose that they will come to a wrong decision, and exceed their jurisdiction; though there are many authorities to shew that prohibition may go even in such cases, and it ought to go where the Court see sufficient reason to suppose that the Court below is exceeding its jurisdiction. (See the *Bishop of Winchester's Case*, 2 Rep. 45 *a*, third resolution.)

We do not think that the cases cited by Sir *Fitzroy Kelly* ought to be held to apply to a case where, the party having declared in prohibition, it appears on the record before us that the Court are proceeding with an attachment which it is admitted on the record they had no jurisdiction to issue. We are bound to give the judgment which the facts upon the record call for, and when it appears that the City Court has exceeded its jurisdiction in issuing the attachment and is proceeding with it, we think that the only judgment warranted by the record is that the prohibition should go to stop such proceeding.

In the present case we can have no doubt of the right of the garnishee to come in and pray for a prohibition. It is at least doubtful whether he has any right to plead in his own person anything except "nil habet," and his only other course would probably be to put in special bail and plead in the name of the defendants; but even if he could, as suggested by Sir *F. Kelly*, shew by way of pleading that there was no jurisdiction to enforce the attachment, still he is in a situation to say that the mischief has been done as against him, and that the Court has already exceeded its jurisdiction.

The whole doctrine relied on by Sir *F. Kelly* depends on the notion that the inferior Court may decide right, and may not, when the matter is before them, exceed their jurisdiction, so that there *may be* no occasion to interfere; but here it is admitted upon the record before us that the

City Court *has already exceeded its jurisdiction* in issuing the attachment, which is clearly a grievance from which the garnishee has a right to be relieved by prohibition.

We think it right to add that, in our opinion, the prohibition, if it be necessary that a writ should issue, ought to be against proceeding with the garnishment, as we approve of the decision in *Manning v. Farquerson* (a), where it was held that the City Court cannot be stopped by prohibition from trying the case as between the plaintiff and defendant in the Court below, if the defendant chooses to have it tried there, and does not plead the want of jurisdiction according to the provisions of the statute referred to by Sir F. Kelly.

In that case, as appears from the report in the Law Journal, the application was to stop the original suit in the Lord Mayor's Court, which it was held, for the reasons given there, ought not to be done; but the Judge there would have had no difficulty in issuing a writ to raise the question whether there was jurisdiction to issue the process of foreign attachment, which, by the custom and according to the authorities, it is now conceded can only issue when the cause of action in the original suit arose within the City.

The judgment of the Court below for the plaintiffs in prohibition is therefore, in our opinion, clearly right, and ought to be affirmed.

Judgment affirmed.

(a) 30 L. J., Q. B. 22, Bail Court.

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## IN THE EXCHEQUER CHAMBER.

*(Error from the Court of Exchequer.)*

June 17.

ROBINS v. EVANS and Others.

The defendant put up for sale by public auction certain property described in the particulars as follows:—

“Four freehold ground rents of 19*l.* 4*s.* each, viz., 15*l.* ground rent and 4*l.* 4*s.* garden rent, amounting to 76*l.* 16*s.* a year, arising from four capital residences of the annual value of 384*l.*, held by four leases

granted to W. Reynolds for a term of ninety-five years each (wanting ten days) from the 29th of September, 1844, with reversion to the property in about eighty years.” The plaintiff became the purchaser and paid the defendant 282*l.* as a deposit in part payment of the purchase money. The vendors in making out their title produced four counterparts of leases from one Roy to Reynolds. By each of these leases, Roy, in consideration of the yearly rents thereafter reserved, demised to Reynolds a piece of land with a messuage thereon for the term of ninety-five years (wanting ten days) at the yearly rent of 15*l.*; and for the considerations aforesaid, and also in consideration of the further rent thereafter reserved and of the covenants of Reynolds, Roy covenanted with Reynolds that it should be lawful for him and the tenants of the messuage, at all times during the continuance of the said term, to enter upon and use and enjoy as a pleasure ground or garden a piece of land particularly described jointly with Roy, and Roy covenanted that he would at his own expense keep in order the garden. There was also a covenant by Reynolds to pay Roy the yearly rent of 15*l.*, and also the further yearly rent of 4*l.* 4*s.* in respect of the right of user of the garden or pleasure ground, such rent to be payable in the same manner as the rent of 15*l.*.—*Held*, in the Exchequer Chamber (affirming the judgment of the Court of Exchequer), that the rent of 4*l.* 4*s.* was a sum in gross payable under a covenant, and not a rent issuing out of the land; and consequently the plaintiff was entitled to rescind the contract and recover back his deposit: per *Wightman, J., Crompton, J., and Blackburn, J.*—*Dissentientibus Williams, J., and Willes, J.*

THIS was a proceeding in error upon the judgment of the Court of Exchequer for the plaintiff, on a special case stated for the opinion of that Court. The special case is fully set out in the report of the case in the Court below: 1 H. & C. 302.

*Bovill* (with whom was *Macnamara*) argued for the plaintiff in error (a) (the defendant below).—First, the defendant has offered to convey to the plaintiffs the identical property which they contracted to purchase, and which is described as “four freehold ground rents of 19*l.* 4*s.* each, viz., 15*l.* ground rent and 4*l.* 4*s.* garden rent.” The judgment of the Court of Exchequer proceeds on the assump-

(a) Dec. 1 and 2, 1862, and 17th June, 1863. Before *Wightman, J., Williams, J., Crompton, J., Willes, J., and Blackburn, J.*

tion that the plaintiffs purchased four freehold ground rents of 19*l.* 4*s.* each. But the particulars of sale contain a clear description of the nature of the property, and convey a distinct intimation that it consists of ground rents and garden rents, and that the ground rents arise from leasehold houses with gardens in their rear, which will remain in the hands of the freeholder, and that one guinea a year will be allowed from each of the garden rents for keeping up the garden; but the purchaser will be entitled to the reversion of the property at the expiration of the leases. The 8th condition provides that the conveyances shall contain a grant of the perpetual right of user of the gardens. By the 10th condition, "if any mistake be made in the description of the property, or any error or mis-statement whatsoever shall appear on the particulars, such mistake, error, or mis-statement, shall not vitiate or annul the sale, but compensation shall be given or taken as the case may be, to be settled by two referees, or their umpire." Therefore, whether the garden rents are freehold ground rents or not, the plaintiffs may obtain a conveyance of all that they bargained for; and if there is any misdescription of the property, they must apply for compensation in manner provided by the 10th condition.

Secondly, the particulars refer to the leases, and state that the properties sold are to be taken as those comprised in the leases, so that the plaintiffs, having purchased with notice of the leases, must be presumed to have known their contents. In *Hall v. Smith* (a), Sir *W. Grant*, M. R., said that, "if the party has notice that the estate is in lease, he has notice of everything contained in the lease." [*Blackburn J.*—But there must be no *misrepresentation*. Sug. Vend. and Purch., p. 6, 14th ed.] Where leasehold property, about to be sold, was described in the particulars of sale as

(a) 14 Ves. 426. 433.

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being held at a ground rent of 86*l.* per annum, and it appeared from the lease that the ground rent was 80*l.*, and one third of the improved yearly rent or value, and there were other stringent covenants in the lease, not noticed in the particulars, such as that no fine should be taken for an underlease or assignment, except with the consent of the reversioner; the purchaser was, nevertheless, compelled to perform his contract: *Pope v. Garland* (a). Alderson, B., there said:—"I see no distinction between this case and those where the landlord sells, and says that the property is under lease. If he do not state it to be so, he does not state the case so as to enable the purchaser to know what he is to purchase, and that is a misrepresentation. But it is clear, and that is not denied in argument, that where there are outstanding leases it is the duty of the purchaser who has notice of them to ask and ascertain what the terms are upon which the property is out on lease, so that he may know precisely the nature of the property which he purchases, that is, whether he has certain rights upon it, or whether his rights are in any manner restricted." *Paterson v. Long* (b) is also an authority that a person who contracts to purchase leasehold property does so with notice of the clauses in the lease. In *Smith v. Watts* (c), the particulars of sale described the property to be sold as leasehold ground-rents of 50*l.* per annum, *amply secured* on six dwelling houses producing a rack rent of 250*l.* per annum, let on lease *for the whole term* at 80*l.* per annum; held under two leases direct from the freeholder for an unexpired term of twenty-six years, at ground rents amounting to 32*l.* The purchaser refused to complete because the ground rent of 50*l.* was not amply secured, and the nature of it was not sufficiently set out: *Kindersley, V.C.*,

(a) 4 Y. &amp; C. 394.

(b) 6 Beav. 590.

(c) 4 Drew. 338.

held that, as the particulars disclosed the facts, and by one of the conditions the purchaser was entitled to inspection of the leases, he was bound to complete the purchase.

Thirdly, both these rents of 15*l.* and 4*l.* 4*s.* are properly described as "freehold ground rents." The demise by the indenture of the 12th of September, 1845, is in consideration of the yearly *rents* thereafter reserved; and by the *reddendum* the yearly rent of 15*l.* is reserved. Then in consideration of the further rent thereafter reserved, and of the covenants and agreements thereafter contained, the lessor grants to the lessee and the occupiers of the houses the use of the garden during the term. There is a covenant by the lessee to pay the said yearly rent thereinbefore reserved, and also the further yearly rent or sum of 4*l.* 4*s.* on the days and in all respects in a similar manner with the rent of 15*l.* There is a proviso for re-entry if "the said yearly *rents*" shall be in arrear, and a covenant for quiet enjoyment upon paying the said yearly *rents* and performing the covenants. So that there is the security of the houses and land for both these rents. Where rent is reserved upon a demise of a corporeal and incorporeal hereditament, the rent will issue wholly out of the corporeal in point of *remedy*, but in point of *render*, out of both: *Doubitoft v. Curteene* (a); *Farewell v. Dickenson* (b). In *Williams v. Haywood* (c) the plaintiff was assignee of a person who demised to the defendant certain mines and minerals for a term of years, reserving a royalty upon the ore raised by defendant, or an annual sum of 100*l.* in lieu thereof, if the royalty in any year should not amount to that sum, with liberty to the defendant to use a certain railway: and it was held that a rent was created which issued out of the mines and minerals, and could not have issued out of the easement

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(a) Cro. Jac. 452.

(b) 6 B. &amp; C. 251.

(c) 1 E. &amp; E. 1040.

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to use the railway; therefore the preventing the defendant from using it was not an eviction from the thing demised, so as to amount to an answer to a claim for rent. Where rent is reserved in respect of a demise of land and goods, the rent issues out of the land: *Newman v. Anderton* (a). [Crompton, J.—In Moor, 201, it is said: “Where a man grants a manor, and the grinding of his mill, for years, rendering for the manor 20s., and for the grinding 10s., there it is taken that the entire rent is chargeable by distress on the manor, for reason that distress does not lie on the grinding.”] In *Roulston v. Clarke* (b) there was a reservation of an increased annual rent, in the nature of a penalty, and it was held that it might be distrained for. In Viner’s Abridg. “Reservation” (O.), pl. 5, it is said:—“If land and the perquisites of a manor, or land and common, or land and an advowson, are demised together, rendering rent, the entire rent shall be issuing out of the land, notwithstanding any severance in the reddendum itself, or by any ‘viz.’ But if it be land which is demised, and part of the rent is referred to one part of the land, and the other part of the rent to the other part of the land, there they shall be several rents, because there is land which is a thing chargeable by itself for each rent.” That distinction is also pointed out in Gilbert on Rents, p. 34. In *Morrice v. Antrobus* (c) a lease of a rectory was made to the plaintiff and his wife for twenty-one years, rendering 40*l.* a year; and the plaintiff covenanted to pay over and above a couple of capons yearly, or 6*s.* 8*d.* in money; and Hale, C. B., held that the capons were “no part of the rent,” because “the lessee only covenanted to pay them, which covenant of his will not bind his wife, if she survive him, and therefore his covenant will not amount to a reser-

(a) 2 N. R. 224.

(b) 2 H. Black. 564.

(c) Hardr. 325.

vation. Otherwise, if both had covenanted, or if the lease had been made to the husband alone with such a covenant." It is not necessary that there should be a reddendum of the rent. A covenant and agreement that A. doth let lands amounts to a lease, and a proviso that B. shall pay an annual rent is a good reservation of it: *Harrington v. Wise* (a). In Rolle's Abridg. "Reservation," (L.) 40, it is said:—"Si A. leas terre al B. per indenture et les parolls sont, *in consideration* del payment del rent *hereafter mentioned*, il leas, &c., et puis en mesme indenture B. covenant pur luy et ses assignes ove A. et ses assignes a paier 10*l.* rent al certen feasts annualment, &c., ceo serra un rent, et nemy un somme en grosse, car sur tout l'indenture ceo serra un reservation et nemy un covenant, car les parolls (en consideration del rent *hereafter mentioned*), fait ceo assets clear: M. 12 Ja. B. R. enter *Athowe v. Heming* adjudge." That case is also cited in Viner's Abridg. "Reservation," (L.), p. 6, and "Rent" (P.), p. 2, note, where it is said:—"Coke, C. J., wondered it could be a doubt in Pl. C., and thought it was clearly a rent." The same doctrine was laid down in *Drake v. Munday* (b). There is, indeed, an *Anonymous* Case in the Modern Reports (c), where *Holt*, C. J., is reported to have said:—"A rent may be reserved on words of covenant; but where there is a rent reserved and a covenant also for other money in the same deed, debt will not lie for the latter: as if I demise twenty acres, reserving 20*l.* a year, and further agree with him in the same deed that for as many acres as he shall plow up he shall give ten shillings more for each per annum; this last is no rent, and an action of debt will not lie for it." But on 12 Modern Reports being cited in *Rex v. The Mayor and Burgesses of Lyme Regis* (d), *Buller*, J., said it "is not a book of any

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(a) Cro. Eliz. 486.

(c) 12 Mod. 74, Case 131.

(b) Cro. Car. 207.

(d) 1 Doug. 79. 83.

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authority." Moreover, the report of the *Anonymous* Case does not state the facts, but a mere dictum of *Holt*, C. J., at variance with the decision of the Court of Common Pleas in *Roulston v. Clarke* (a); and clearly it is not law that debt will not lie on a covenant to pay money.—He argued, fourthly, that assuming there was a mistake in the description of the property, that did not annul the sale, but only entitled the plaintiff to compensation in manner provided by the 10th condition, which applied to all cases except that of intentional misrepresentation. On this point he cited *Bartlett v. Salmon* (b); *The Duke of Norfolk v. Worthy* (c); *Trower v. Newcome* (d).

*Rochfort Clarke*, for the defendant in error (the plaintiff below).—First, the annual sum of 4*l.* 4*s.* is not a ground rent. The demise is not merely in consideration of the yearly rents, but also of the covenants and agreements. The indenture deals with two distinct matters, viz., the land and the garden. There is a demise of the land, and in respect of that a yearly rent of 15*l.* is reserved. There is no demise of the garden, but the lessor, "for the considerations aforesaid and also in consideration of the further rent thereafter reserved, covenants and agrees that the lessee and his tenants shall have a right to use it, and the lessee covenants that he will pay the annual rent of 15*l.*, and also the 4*l.* 4*s.* a year in respect of the right of user of the garden. Where there is an express covenant no other covenant can be implied: *Aspdin v. Austin* (e). The right to use the garden in common with others is a mere license out of which a rent cannot issue. In the cases cited, there was a reservation of one entire rent in respect

(a) 2 H. Black. 564.

(b) 6 De Gex, Mac. &amp; G. 33.

(c) 1 Camp. 340.

(d) 3 Meriv. 704.

(e) 5 Q. B. 671.

of a demise of land and several other premises. Here the land and the garden, and the annual sums reserved in respect of them, are treated as distinct matters. It may be, that it was advisedly done, in order that an eviction from the garden might not cause a suspension of the whole 19*l.* a year. If the lessor had covenanted that the lessee should have the exclusive use of the garden, the case might have fallen within the authorities cited that there may be a demise without express words to that effect. A grant by deed to dig and search for minerals does not amount to a lease: *Doe d. Hanley v. Wood* (a). In *Daniel v. Gracie* (b) there was a reservation of separate rents in respect of a demise of several premises. But where the owner of mines conveyed them to a purchaser, subject to the payment of a certain sum by twelve yearly instalments, which were secured by powers of distress and right of entry, it was held that these yearly instalments were not rent: *Lord Hatherton v. Bradburne* (c). In *Doubitofte v. Curteene* (d), and *Farewell v. Dickenson* (e), one rent was reserved in respect of land and other things. *Williams v. Hayward* (f), and *Newman v. Anderton* (g), shew that a rent cannot issue out of an easement. In *Roulston v. Clarke* (h), the only question was whether the additional sum reserved was a rent or a gross sum in the nature of a penalty. [*Willes, J.* referred to *Politt v. Forrest* (i).] The proposition stated in Viner's Abridg. "Reservation," (O) 5, and Gilbert on Rents, p. 34, is not disputed. In *Morrice v. Antrobus* (k), the only question was whether the lease was a good ecclesiastical lease. *Harrington v. Wise* (l) only shews that a covenant to pay an annual sum in

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(a) 2 B. &amp; Ald. 724.

(b) 6 Q. B. 145.

(c) 13 Sim. 599.

(d) Cro. Jac. 452.

(e) 6 B. &amp; C. 251.

(f) 1 E. &amp; E. 1040.

(g) 2 N. R. 224.

(h) 2 H. Black. 564.

(i) 11 Q. B. 949.

(k) Hardr. 325.

(l) Cro. Eliz. 486.



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respect of land demised is a good reservation of rent. In the case cited in Rolle's Abridg. "Reservation," (L) 40, and Viner's Abridg. "Reservation," (L) p. 6, the annual sum was intended to be reserved as rent; for the words are "in consideration of the payment of the rent hereafter mentioned." So, in *Drake v. Munday* (a), the annual sum was to be paid in respect of the enjoyment of the house. In *Coomber v. Howard* (b), there was a demise of a house at a certain rent and a demise of a stable at a further rent. So, in *Tanfield v. Rogers* (c), there was a reservation of one rent for the scite and demesnes of a manor, and another rent for the manor itself. Though the demise of the use of the garden is an incorporeal hereditament, the lessee might be evicted from it: *Palmer v. Gooden* (d), which would occasion a suspension of the rent. Again, the lessor might sell the garden, and convey it to the purchaser separated from the houses, in which case the entire right in respect of it would be destroyed: *Winter's Case* (e). Besides there is a right of entry upon breach of any one of the covenants. Moreover the covenant to pay the annual sum of 4*l.* 4*s.* is a mere collateral covenant which would not run with the land; *Spencer's Case* (f); *Webb v. Russell* (g); *Flight v. Glossop* (h). —He argued, secondly, that there was such a misdescription as to annul the contract, not a mere mistake for which compensation was to be awarded in manner provided: *Coverley v. Burrell* (i); *Dykes v. Blake* (k); *Dobell v. Hutchinson* (l); *Ayles v. Cox* (m); *Paterson v. Long* (n); *Smith v. Watts* (o);

(a) Cro. Car. 207.

(b) 1 C. B. 440.

(c) Cro. Eliz. 340.

(d) 8 M. &amp; W. 890.

(e) 3 Dyer, 308 b.

(f) 5 Rep. 29.

(g) 3 T. R. 393.

(h) 2 Bing. N. C. 125.

(i) 5 B. &amp; Ald. 257.

(k) 4 Bing. N. C. 463. 476.

(l) 3 A. &amp; E. 356.

(m) 16 Beav. 23.

(n) 6 Beav. 590.

(o) 4 Drew. 338.

*Pope v. Garland* (a); *Hall v. Smith* (b); *Jones v. Edney* (c); Sugden's Vend. & Purch., p. 7, 14th ed. Upon the point as to constructive notice of the contents of the lease, he was stopped by the Court.

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*Maçnamara* replied.—He cited Gale on Easements, p. 73, 3rd ed.; *Bally v. Wells* (d); Gilbert on Rents, p. 188. *Cur. adv. vult.*

In the ensuing Michaelmas Vacation (Dec. 2), the following judgment of CROMPTON, J., in which WIGHTMAN, J., concurred, was read by

BLACKBURN, J.—I think that the real meaning of the particulars and conditions of sale is that the rent of 19*l.* 4*s.*, consisting of the 15*l.* and the 4*l.* 4*s.* garden rent, are to be secured by way of rent on the respective freehold residences, the reversion to which is also to be conveyed to the purchasers; and the question seems to me to be whether, on the true construction of the leases, what is called the garden rent of 4*l.* 4*s.* is really secured by way of rent on the residences, in other words whether the garden rent is really so secured as to be issuing out of the freehold residences, the reversion to which is to vest in the purchasers at the termination of the leases.

We were much pressed during the argument with the doctrine established by the class of cases which shew that where a rent is clearly reserved quâ rent, one part being in respect of the enjoyment of land and the other part in respect of some incorporeal hereditaments out of which rent could not issue, the whole rent is taken to issue out of

(a) 4 Y. &amp; C. 394.

(b) 14 Ves. 426.

(c) 3 Camp. 285.

(d) Wilmot's Notes, 341.

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the corporeal hereditaments. And we were also referred to several expressions in the leases which were said to shew the intention of the parties to be that the garden rent or sum was to be *rent* and must therefore issue out of the residences, the only corporeal hereditaments out of which rent, properly so called, could issue.

It was said in respect of this view that the lease was expressed to be made in consideration, inter alia, "of the rents," in the plural, "thereby reserved," that the garden rent was "to be paid in the same manner and at the same time as the other," and that "a right of re-entry was reserved," inter alia, "on the non-payment of the rents."

Upon the construction of the deed, and in this case, as in all others, we must decide according to the real intention of the parties as expressed upon the whole of the deed, I have not been able to satisfy myself that this deed can be construed as meaning that the garden rent was to be an additional rent to arise out of the residences.

Looking to the reddendum, the most important part of the deed for this purpose, I find that the rent to be reserved, "therefore," that is, for the demise of the residence, is 15*l.*, clearly a rent reserved in respect of the enjoyment and issuing out of the residence. Then there is a marked difference in the covenant as to what is to be paid for the enjoyment of the easement in the garden. That is done by a covenant in a subsequent part of the deed, whereby, after covenanting to pay the real rent, there is a further covenant to pay a further rent *or sum* for and in respect of the easement. Here, then, we have a marked distinction between the reservation of what really is a rent and a covenant to pay a sum in respect of an easement.

The lease speaks of this latter sum as a rent *or sum*, clearly as it seems to me pointing out the very distinction

between a real rent and a payment for an easement. It says, in effect, there is a further annual amount to be paid for the easement, but as that is for an incorporeal hereditament, and is not to issue out of the land, we are not sure whether we can properly call it a rent. If intended to be a part of one entire rent to issue out of the residence and to be increased because of the advantage of the easement, why should the terms be varied by introducing the words *or sum*?

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It seems to me that the parties contemplated what may be popularly called, though incorrectly, a rent out of and in respect of the easement. Just as a payment for a mere right of way might be incorrectly called a rent. They say, in effect, that they are not sure if it be a rent. To bring the case within the doctrine insisted on by the defendant the whole 19*l.* 4*s.* ought to be really one rent plainly reserved, though the particulars of the rent reserved may be distributed into so much for the land and so much for the easement or other advantages which are to increase the rent of the land, out of which only it can issue. It is true, as urged in argument, that a rent may be reserved where there is no *reddendum* by words of covenant, but no case was brought before us where the *reddendum* was clearly confined to the one rent and there was a covenant afterwards for the payment of another annual sum in respect of an easement.

This marked distinction between the *reddendum* and the covenant to pay the rent or sum seems to me to make it very difficult to hold that the two sums were one rent reserved out of the residences, and I think outweighs the effect of the expressions in the lease relied on by the defendant. It seems to me, therefore, that there was no rent of 19*l.* 4*s.* reserved out of the residences; and the thing sold was, in my opinion, a different thing, and of a

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different nature from that contracted to be sold. It was towards the end of the argument scarcely denied by the counsel for the appellants that the agreement that errors in description should not vitiate the contract, but be matter for compensation, does not extend so far as to bind the purchaser to take a thing of a different kind and different nature from that which he contracted to purchase. I think, therefore, that the vendor was not able to carry out his contract, and that the judgment of the Court below ought to be affirmed.

My brother *Wightman*, as I have mentioned, concurs in this judgment.

For myself I wish to add, that having had the advantage of reading and considering both this judgment and that of my brother *Willes*, I have come to the conclusion that the judgment below ought to be affirmed. I agree with, I believe, all the Judges of this Court that the conditions of sale cure errors of description, &c., but do not extend so far as to entitle the vendor to require the purchaser to take something of a different nature from that for which he bargained, and, consequently, that if this annual sum of 4*l.* 4*s.* is a rent issuing out of the premises, the purchaser is bound under this contract to take it, though it may not be in all respects a freehold rent such as is described; but, on the other hand, that if this 4*l.* 4*s.* is a sum in gross only, secured by personal covenants, the purchaser is not bound to take it, and, consequently, that the only question is, whether this sum is a rent issuing out of the premises or not.

And I agree, I believe, with all the other Judges of this Court, that this question depends on the intention of the parties to the deed, as appearing on the face of the deed, construed according to the legal rules of construction.

I need not repeat the reasons which my brother *Crompton*

has given for thinking that the true construction of the instrument is not to create a rent; I am far from thinking it a clear case, or that the reasons given by my brother *Willes* are not very forcible; but, on the whole, I think the reasons given by my brother *Crompton* are more convincing.

I therefore think that the judgment should be affirmed.

**WILLES, J.**—It is right to preface this judgment by saying that, although my brother *Williams* and myself take a different view of the construction of the lease of 1845 from that which was entertained in the Exchequer, and has just been expressed by the majority of the Judges in this Court, there is no difference of opinion as to the principles of law applicable to this case, but only as to their application.

The question is whether the vendor had a good title to what he sold. We are of opinion that he had.

The subject-matter of the sale was described as “four freehold ground rents of 19*l.* 4*s.* each, viz., 15*l.* ground rent and 4*l.* 4*s.* garden rent,” arising from four houses held by four leases granted to Reynolds for ninety-five years each (wanting ten days), from the 29th September, 1844, “with reversion to the property in about eighty years.”

The eighth condition completed the description of the property, for it provided that the conveyance to the purchaser shall contain a grant of a perpetual right of user of the garden then enjoyed by the tenants of the houses, as appurtenant to each house, and that the purchaser may in return grant a perpetual rent charge of one guinea a year issuing out of each house, with the usual powers of distress and entry.

Thus it was plainly announced to the purchaser that what he was buying was a freehold reversion expectant upon the leases of the four houses, in respect of which there was reserved a rent or rents of 19*l.* 4*s.* each, made

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up of 15*l.* a year reserved out of the house in respect of the use of the house, and 4*l.* 4*s.* a year reserved out of the house in respect of the additional value given to it by having annexed thereto the right to use the gardens in the same way as other gardens in the squares of London are ordinarily used.

Now the vendor had power to convey all these advantages to the purchaser if, in point of law, the 4*l.* 4*s.* was rent issuing out of the house; for had the conveyance been made the purchaser would have acquired the reversion in fee simple in the four houses with the rents thereto annexed during the term, and at its expiration he would by the conveyance have had the fee simple in possession; and by the grant provided for by the eighth condition, the perpetual right to use this garden by himself and his heirs or their tenants.

Whether this grant and that in the lease are to be considered as creating an easement at common law appurtenant to the house, it is not necessary to consider. It is enough to observe that this use of the garden was secured, as it could by law be; that no objection was raised, probably none could have been raised, as to the effect of such a grant; and that this benefit, whatever be its legal character, was necessary for the comfort of the house.

On the part of the defendant in error, it is contended that the sum of 4*l.* 4*s.* is a mere sum in gross secured by the personal covenant of the lessee, and which he and his representatives only are liable to pay to the lessor and his personal representatives only during the term.

And the defendant in error relies upon the terms of the lease by which he alleges that that sum is only covenanted to be paid as a sum in gross, and not reserved as rent for the houses.

On the other hand the plaintiff in error, admitting that

the question must turn upon the words of the lease, insists<sup>o</sup> that it may and ought to be construed in accordance with what his counsel contended to be the manifest intention of the parties, and the nature of the transaction itself as reserving the 4*l.* 4*s.* for rent of the principal subject-matter, viz. the houses, in consideration of the additional value given to it by the annexation of the right to use this garden.

And we are of opinion that such appears from the lease itself to have been the intention of the parties, and that, following the guidance of the Court of Common Pleas in the leading case of *Roe v. Tranmerr* (a), we ought to construe the words in such a manner as to give effect to the intention of the parties as it appears upon the instrument, even though the words used are not strictly technical.

There are to our minds many indications of such an intention both in this transaction itself and in the language of the lease, and no clear indication to the contrary. It was intended by the parties to make and take a lease which should be assignable with all the benefits conferred by the lease, including the right to use the garden, and the reversion of which should in like manner be assignable with its advantages. All convenience, and therefore the probable intent of the parties, requires that this should be upheld so far as the law will allow. And it may be upheld if the 4*l.* 4*s.* be a garden rent, but not if it be a sum in gross. If it be not a rent this absurdity may follow, that the assignee of the houses will enjoy the garden, and the lessee who has parted with the houses and garden will have to pay the original lessor who may have parted with the reversion.

Now, the character of the transaction and the general intent of the parties being thus clear, let us refer to the

(a) Willes, 682.

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lease in order to see whether the words compel us to defeat that intention, or enable us to give effect to it.

The lease recites that it is made in consideration of, amongst other things, "the yearly rents hereinafter reserved." Here rents are spoken of in the plural, and although we agree that no words can make a rent of what is not in its nature a rent, yet, when the question is whether a payment is to be considered as intended to be a rent or not, its being called so by the parties interested, ought to be considered as proof of their intention.

The reddendum is, "yielding and paying therefore the yearly rent of 15*l*." This does not exclude a reservation of further rent.

Accordingly, it is further witnessed, that "for the considerations aforesaid," that is, *in consideration* of taking *the lease of the house*, and in consideration of the "further rent," the landlord covenants that the lessee and his assigns shall have the use of the garden, which could only be used by the occupiers of the house and is but an accessory to it, the principal subject-matter of the demise.

Then follows the covenant by the lessee to pay the 15*l* a year, "and also the further yearly rent or sum of 4*l* 4*s*., for, and in respect of, the right of user hereinbefore granted of the said garden or pleasure ground, such last mentioned rent to be payable on the days, and in all respects in a similar manner with the rent of 15*l*. per annum hereinbefore reserved and made payable." This language is not merely to the effect, but to my apprehension expresses, that the 4*l*. 4*s*. a year is reserved and made payable as the 15*l* a year is, with a statement annexed that it is payable not out of the incorporeal hereditament from which it could not issue, but out of the houses from which it could issue; and that in consideration of the value of the houses, without

which the use of the garden could not be had, being increased by the use of the garden.

This is again apparent in the terms of the proviso for re-entry for the landlord and the assignee of the reversion, which applies to both the payment of the 15*l.* and the payment of the 4*l.* 4*s.*, and which could not be exercised by the assignee of the reversion, unless the 4*l.* 4*s.* were considered to be reserved as a rent.

Therefore, inasmuch as the parties have themselves called the payment a rent, and it is capable of being so, and the intention expressed upon the lease can be given effect to by so holding it, and will be defeated by not doing so; we construe it to be a rent, and we hold that the vendor had a good title to what he contracted to sell.

As for the cases cited in which certain collateral payments have been held not to be rents, they are inapplicable to the case of a covenant to pay an additional sum as rent for the principal subject of demise in respect of some benefit to be enjoyed with the house as an accessory thereto.

It may be added, that the question whether a demise by the lessor and a covenant by the lessee to pay a yearly sum without any formal reservation constitute a rent, was decided in the affirmative by Lord *Coke* in *Atto v. Hemming* (a).

In our opinion the judgment of the Court of Exchequer ought to be reversed and judgment given for the defendant. But as the majority of the Court are of a different opinion, the judgment is affirmed.

Judgment affirmed.

(a) 2 Bulst. 281.

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## MEMORANDA.

In this Vacation (29th July) Sir *Cresswell Cresswell*, Knt., the first Judge Ordinary of the Probate and Divorce Courts (formerly one of the Judges of the Court of Common Pleas), died at his residence, Prince's Gate, Knightsbridge.

He was succeeded by Sir *James Plaisted Wilde*, one of the Barons of the Court of Exchequer.

Mr. Serjeant *Pigott* was appointed one of the Barons of the Court of Exchequer in the place of Sir *James Plaisted Wilde*.

•  
Sir *William Atherton*, her Majesty's Attorney General, resigned his office in consequence of continued indisposition, and died on the 22nd January, 1864.

Sir *Roundell Palmer*, Knt., her Majesty's Solicitor General, succeeded to the office of Attorney General, and *Robert Porrett Collier*, Esq., one of her Majesty's Counsel, was appointed her Majesty's Solicitor General, and afterwards received the honour of Knighthood.

In the course of this Vacation, *William Henry Cooke*, Esq., of the Inner Temple; *John Gray*, Esq., of the Middle Temple; *John Joseph Powell*, Esq., of the Middle Temple, and *George Loch*, Esq., of the Middle Temple, were appointed her Majesty's Counsel.

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## REVENUE SIDE.

In pursuance of the provisions contained in the 26th section of the 22 & 23 Vict. c. 21, intituled "An Act to regulate the office of Queen's Remembrancer, and to amend the Practice and Procedure on the Revenue Side of the Court of Exchequer," it is ordered, that the following provisions of the Common Law Procedure Act, 1854, be extended, applied, and adapted to the Revenue Side of the Court of Exchequer; and also, that the following rules as to giving bail in cases of appeal shall be in force on the Revenue Side of the Court of Exchequer:—

1. In all cases of rules to enter a verdict or nonsuit upon a point reserved at the trial, if the rule to shew cause be refused or granted and then discharged or made absolute, the party decided against may appeal.

2. In all cases of motions for a new trial upon the ground that the Judge has not ruled according to law, if the rule to shew cause be refused, or, if granted, be then discharged or made absolute, the party decided against may appeal, provided any one of the Judges dissent from the rule being refused or when granted being discharged or made absolute, as the case may be, or provided the Court, in its discretion, think fit that an appeal should be allowed; provided that where the application for a new trial is upon matter of discretion only, as on the ground that the verdict was against the weight of evidence, or otherwise, no such appeal shall be allowed.

3. The Court of Error, the Exchequer Chamber, and the House of Lords shall be Courts of Appeal for this purpose.

4. No appeal shall be allowed unless notice thereof be given in writing to the opposite party or his attorney, and to the Queen's Remembrancer, within four days after the decision complained of, or such further time as may be allowed by the Court or a Judge.

(a) See *The Attorney General v. Sillem*, post, p. 581.

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5. The appeal hereinbefore mentioned shall be upon a case to be stated by the parties (and in case of difference to be settled by the Court or a Judge of the Court appealed from), in which case shall be set forth so much of the pleadings, evidence, and the ruling or judgment objected to, as may be necessary to raise the question for the decision of the Court of Appeal.

6. When the appeal is from the refusal of the Court below to grant a rule to shew cause, and the Court of Appeal grant such rule, such rule shall be argued and disposed of in the Court of Appeal.

7. The Court of Appeal shall give such judgment as ought to have been given in the Court below ; and all such further proceedings may be taken thereupon as if the judgment had been given by the Court in which the record originated.

8. The Court of Appeal shall have power to adjudge payment of costs, and to order restitution, and they shall have the same powers as the Court of Error in respect of awarding process, and otherwise.

9. Upon an award of a trial de novo, by the Court, or by the Court of Error, upon matter appearing upon the record, error may at once be brought ; and, if the judgment in such or any other case be affirmed in error, it shall be lawful for the Court of Error to adjudge costs to the defendant in error.

10. When a new trial is granted on the ground that the verdict was against evidence, the costs of the first trial shall abide the event, unless the Court shall otherwise order.

11. Upon motions founded upon affidavits, it shall be lawful for either party, with leave of the Court, or a Judge, to make affidavits, in answer to the affidavits of the opposite party, upon any new matter arising out of such affidavits, subject to all such rules as shall hereafter be made respecting such affidavits.

12. Notice of appeal shall be a stay of execution, provided, that within eight days after the decision complained of, or before execution delivered to the sheriff, bail to pay the sum recovered, and costs, or to pay costs when adjudged, be given in like manner and to the same amount as bail in error is required to be given under the rules of this Court made on the 22nd day of June, 1860, or as near thereto as may be applicable ; provided that such bail shall not be necessary to stay execution in cases where the appellant is the Crown, the Attorney General on behalf of the Crown, or the Prince of Wales, or the Duke of Cornwall, for the time being.

The foregoing Rules shall come into operation and take effect forthwith, and apply to every cause, matter, and proceeding now pending.

Dated the 4th day of  
November, A. D. 1863.

FRED. POLLOCK.  
G. BRAMWELL.  
W. F. CHANNELL.  
G. PIGOTT.

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## THE ATTORNEY GENERAL v. SILLEM and Others.

Nov. 17, 18,  
19, 20, 21, 23.

**INFORMATION** by the Attorney General, that on the 5th of April, 1863, an officer of the Customs, then by law empowered so to do, did seize and arrest as forfeited a certain ship or vessel called the "Alexandra," together with the furniture, tackle and apparel belonging to and on board the said ship or vessel.

The building, in pursuance of a contract, with intention to sell and deliver to a belligerent power, the hull of a vessel suitable for war, but unarmed, and not equipped, furnished, or fitted out with anything

First count.—For that certain persons, to wit, William Cowley Miller, Thomas Miller, Charles Kuhn Prioleau,

which enables her to cruise or commit hostilities, or do any warlike act whatever, is not a violation of the Foreign Enlistment Act, 59 Geo. 3, c. 69.

The equipment forbidden by the statute is an equipment of such a warlike character as enables the ship on leaving a port in this kingdom to cruise or commit hostilities: Per *Pollock*, C. B., and *Bramwell*, B.

If the character of the equipment is doubtful, it may be explained by evidence of the intent of the parties: Per *Channell*, B.

The Act includes a case where the equipment is such that although the ship when it leaves a port in this kingdom is not in a condition at once to commit hostilities, is yet capable of being used for war, and the intent is clear that it is to be used for war: Per *Channell*, B.


Any act of equipping, furnishing, or fitting out, done to the hull or vessel, of whatever nature or character that act may be, if done with the prohibited intent, is within the language, and also within the spirit of the statute: Per *Pigott*, B.

On the trial of an information respecting the seizure of a vessel in a port at Liverpool for an alleged violation of the Foreign Enlistment Act, by equipping her for the service of a belligerent state.

*Held*: Per *Bramwell*, B., that a right direction would be, that if the jury were satisfied that the parties concerned were equipping, or arming, or attempting so to do, the ship claimed, with intent that it should be employed in the service of a foreign power to cruise or commit hostilities against others as alleged, they should find for the Crown; but such equipment or attempted equipment must be of a warlike character, so that by means of it she is in a condition more or less effective to cruise or commit hostilities; otherwise find for the claimants.

Per *Channell*, B.—The questions left to the jury should have been; 1st. Was there an intent on the part of anyone having a controlling power over the vessel that she should be employed in the service of the Confederate States to cruise or commit hostilities against the United States? 2nd. If so, was she equipped, fitted out, or furnished in a British port in order to be employed to cruise, &c.? 3rd. If not equipped, was there any attempt to equip her in a British port in order that she should be so employed? 4th. Or did anyone knowingly assist, &c., in such equipment in a British port?

Per *Pigott*, B.—The jury should have been directed to see; first, whether the equippers, or the purchasers, had the prohibited intent: and secondly, whether with such intent they had done any act towards equipping, furnishing, or fitting out the ship, beyond the mere work of building the hull of the vessel, or had attempted or endeavoured so to do,

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James Thomas Welsman, Eugene Tessier, James Bulloch, Matthew Butcher, Hermann James Sillem, Henry Berthon Preston, Jacob Willink, David Wilson Thomas, William Thompson Mann, and divers and very many other persons whose names are to the said Attorney General at present unknown, heretofore and before the making of the said seizure, and after the 3rd day of July, A.D. 1819, and before the 25th day of May, A.D. 1863, to wit, on the 5th day of April, 1863, within a certain part of the United Kingdom, to wit, Ratcliff, in the county of Middlesex, without any leave or licence of her Majesty for that purpose first had and obtained, did equip the said ship or vessel with intent and in order that such ship or vessel should be employed in the service of certain foreign states, styling themselves the Confederate States of America, with intent to cruize and commit hostilities against a certain foreign state, with which her Majesty was not then, to wit, on the day and year last aforesaid, at war, to wit, the Republic of the United States of America, contrary to the form of the statute in such case made and provided; whereby and by force of the statute in that case made and provided, the said ship or vessel, together with the said tackle, apparel, and furniture, became and was forfeited.

Second count.—For that certain persons, to wit, William Cowley Miller, Thomas Miller, &c. (naming the same persons), heretofore and before the making of the said seizure, and after, &c., and within a certain part of the United Kingdom, to wit, &c., without any leave or licence of her Majesty for that purpose first had and obtained, did equip the said ship or vessel, with intent and in order that such ship or vessel should be employed in the service of certain foreign states, styling themselves the Confederate States of America, with intent to cruize and commit hosti-

lities against citizens of a certain foreign state, with whom and with which respectively her Majesty was not then, to wit, on &c., at war, to wit, citizens of the Republic of the United States of America, contrary to the form of the statute, &c.

Third count.—For that certain persons, to wit, William Cowley Miller, Thomas Miller, &c., heretofore and before the making of the said seizure, and after, &c., within a certain part of the United Kingdom, to wit, &c., without any leave or licence of her Majesty for that purpose first had and obtained, did equip the said ship or vessel, with intent to cruize and commit hostilities against a certain foreign state, with which her Majesty was not then, to wit, on &c. at war, to wit, the Republic of the United States of America, contrary to the form of the statute, &c.

Fourth count.—For that certain persons, to wit, William Cowley Miller, Thomas Miller, &c., heretofore and before the making of the said seizure, and after &c., within a certain part of the United Kingdom, to wit, &c., without the leave and licence of her Majesty for that purpose first had and obtained, did equip the said ship or vessel, with intent to cruize and commit hostilities against citizens of a certain foreign state, with whom and with which respectively her Majesty was not then, to wit, on &c. at war, to wit, citizens of the Republic of the United States of America, contrary to the form of the statute, &c.

Fifth count.—For that certain persons, to wit, William Cowley Miller, Thomas Miller, &c., heretofore and before the making of the said seizure, and after &c., within a certain part of the United Kingdom, to wit, &c., without any leave or licence of her Majesty for that purpose first had and obtained, did equip the said ship or vessel, with intent and in order that such ship or vessel should be employed in

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the service of divers and very many persons exercising the powers of government in and over certain foreign states styling themselves the Confederate States of America, with intent to cruize and commit hostilities against a certain foreign state, with which her Majesty was not then, to wit, on &c., at war, to wit, the Republic of the United States of America, contrary to the form of the statute, &c.

Sixth count.—For that certain persons, to wit, William Cowley Miller, Thomas Miller, &c., heretofore and before the making of the said seizure, and after &c., within a certain part of the United Kingdom, to wit, &c., without any leave or licence of her Majesty for that purpose first had and obtained, did equip the said ship or vessel, with intent and in order that such ship or vessel should be employed in the service of divers and very many persons exercising the powers of government in and over certain foreign states styling themselves the Confederate States of America, with intent to cruize and commit hostilities against citizens of a certain foreign state, with whom and with which respectively her Majesty was not then, to wit, on &c., at war, to wit, citizens of the Republic of the United States of America, contrary to the form of the statute, &c.

Seventh count.—For that certain persons, to wit, William Cowley Miller, Thomas Miller, &c., heretofore and before the making of the said seizure, and after &c., within a certain part of the United Kingdom, to wit, &c., without any leave or licence of her Majesty for that purpose first had and obtained, did equip the said ship or vessel with intent and in order that such ship or vessel should be employed in the service of divers and very many persons exercising the powers of government over part of a certain foreign people, to wit, part of the people of the United States of America, with intent to cruize and commit hostilities against a certain

foreign state, with which her Majesty was not then, to wit, on the day and year last aforesaid, at war, to wit, the Republic of the United States of America, contrary to the form of the statute, &c.

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Eighth count.—For that certain persons, to wit, William Cowley Miller, Thomas Miller, &c., heretofore and before the making of the said seizure, and after &c., within a certain part of the United Kingdom, to wit, &c., without any leave or licence of her Majesty for that purpose first had and obtained, did equip the said ship or vessel, with intent and in order that such ship or vessel should be employed in the service of divers and very many persons exercising the powers of government over part of a certain foreign people, to wit, part of the people of the United States of America, with intent to cruize and commit hostilities against citizens of a certain foreign state, with whom and with which respectively her Majesty was not then, to wit, on &c., at war, to wit, citizens of the Republic of the United States of America, contrary to the form of the statute, &c.


The 9th, 10th, 11th, 12th, 13th, 14th, 15th, and 16th counts, respectively, only differed from the first eight counts by substituting “did furnish” for “did equip.”

The 17th, 18th, 19th, 20th, 21st, 22nd, 23rd, and 24th counts, respectively, only differed from the first eight counts by substituting “did fit out” for “did equip.”

The 25th, 26th, 27th, 28th, 29th, 30th, 31st, and 32nd counts only differed from the first eight counts by substituting “did attempt and endeavour to equip” for “did equip.”

The 33rd, 34th, 35th, 36th, 37th, 38th, 39th, and 40th counts, respectively, only differed from the first eight counts by substituting “did attempt and endeavour to furnish” for “did equip.”

The 41st, 42nd, 43rd, 44th, 45th, 46th, 47th, and 48th counts, respectively, only differed from the first eight counts

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by substituting “did attempt and endeavour to fit out” for “did equip.”

The 49th, 50th, 51st, 52nd, 53rd, 54th, 55th, and 56th counts, respectively, only differed from the first eight counts by substituting “did procure to be equipped” for “did equip.”

The 57th, 58th, 59th, 60th, 61st, 62nd, 62rd, and 64th counts, respectively, only differed from the first eight counts by substituting “did procure to be furnished” for “did equip.”

The 65th, 66th, 67th, 68th, 69th, 70th, 71st, and 72nd counts, respectively, only differed from the first eight counts by substituting “did procure to be fitted out” for “did equip.”

The 73rd, 74th, 75th, 76th, 77th, 78th, 79th, and 80th counts, respectively, only differed from the first eight counts by substituting “did knowingly aid, assist, and be concerned in equipping” for “did equip.”

The 81st, 82nd, 83rd, 84th, 85th, 86th, 87th, and 88th counts, respectively, only differed from the first eight counts by substituting “did knowingly aid, assist, and be concerned in furnishing” for “did equip.”

The 89th, 90th, 91st, 92nd, 93rd, 94th, 95th, and 96th counts, respectively, only differed from the first eight counts by substituting “did knowingly aid, assist, and be concerned in fitting out” for “did equip.”

Ninety-seventh count.—For that certain persons, to wit, William Cowley Miller, Thomas Miller, &c., heretofore and before the making of the said seizure, and after &c., within a certain part of the United Kingdom, to wit, &c., without any leave or licence of her Majesty for that purpose first had and obtained, did attempt to fit out the said ship or vessel with intent and in order that such ship or vessel should be employed in the service of divers and very many

persons exercising the powers of government over part of a certain foreign people, to wit, part of the people of the United States of America, as a transport or store ship, against a certain foreign state with which her Majesty was not then, to wit, &c., at war, to wit, the Republic of the United States of America, contrary to the form of the statute in such case made and provided; whereby, and by force of the statute, &c.

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Ninety-eighth count.—For that certain persons, to wit, William Cowley Miller, Thomas Miller, &c., heretofore and before the making of the said seizure, and after, &c., within a certain part of the United Kingdom, to wit, &c., without any leave or licence of her Majesty for that purpose first had and obtained, did equip, furnish, and fit out, and did attempt and endeavour to equip, furnish, and fit out, and did procure to be equipped, furnished, and fitted out, and did knowingly assist and be concerned in the equipping, furnishing, and fitting out of the said ship or vessel, with intent and in order that such ship or vessel should be employed in the service of certain foreign states styling themselves the Confederate States of America, and in the service of divers and very many persons exercising and assuming to exercise the powers of government in and over certain foreign states styling themselves the Confederate States of America, and in the service of divers and very many persons exercising and assuming to exercise powers of government over part of a certain foreign people, to wit, part of the people of the United States of America, as a transport or store ship, against and with intent to cruize and commit hostilities against a certain foreign state with which her Majesty was not then, to wit, on the day and year last aforesaid, at war, to wit, the Republic of the United States of America, and against citizens of a certain foreign state with whom and with which respectively her

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Majesty was not then at war, to wit, citizens of the Republic of the United States of America, contrary to the form of the statute, &c.

Plea.—And hereupon Hermann James Sillem, Henry Berthon Preston, Jacob Willink, David Wilson Thomas, and William Thompson Mann, who claim (*a*) the property of the said ship or vessel called the “Alexandra,” and the furniture, tackle, and apparel belonging to and on board the said ship or vessel to belong to them, by &c., their attorney, appear here in Court, and for plea to the said information say that the said ship or vessel, furniture, tackle, and apparel did not, nor did any or either of them, or any part thereof, become, nor are, nor is the same, or any or either of them, or any part thereof, forfeited for the several supposed causes in the said information mentioned, or for any or either of them, in manner and form as by the said information is charged. And of this the said claimants put themselves upon the country.—Issue thereon.

At the trial, before *Pollock*, C. B., at the Middlesex Sittings, after last Trinity Term, it appeared that, on the 6th of April, 1863, the ship “Alexandra” was seized by an officer of the Customs, in a dock at Liverpool, called the “Toxteth Dock,” for an alleged contravention of the Foreign Enlistment Act, 59 Geo. 3, c. 69. The claimants carried on business as engineers at Liverpool, under the firm of Fawcett, Preston & Co., and were allowed to defend on their attorney making the affidavit prescribed by the Customs Consolidation Act, 1853, 16 & 17 Vict. c. 107, s. 309. The ship was built in the yard of Messrs. Miller & Sons of Liverpool, who stated that she was built for Messrs. Fraser, Trenholm & Co., who were merchants at Liverpool, and agents of the Confederate States of America. She was launched in March and immediately taken to the Toxteth Dock for completion. She was strongly built, principally of teak wood; her beams and

(*a*) See Customs Consolidation Act, 1853, 16 & 17 Vict. c. 107, s. 309.

hatches in strength and distance apart were greater than those in merchant vessels; the length and breadth of her hatches were less than the length and breadth of hatches in merchant vessels; her bulwarks were strong and low, and her upper decks were of pitch pine. At the time of her seizure workmen were variously engaged in fitting her with staunchions for hammock nettings; iron staunchions were fitted in the hold; her three masts were up and had lightning conductors on each of them; she was provided with a cooking apparatus sufficient for 150 or 200 people; she had complete accommodation for men and officers; she had only stowage room sufficient for her crew, supposing them to be thirty-two men, and she was apparently built for a gun boat with low bulwarks, over which pivot guns could play. The commander of her Majesty's ship "Majestic," stationed at Liverpool, stated that she certainly was not intended for mercantile purposes; that she might be used for a yacht, and was easily convertible into a man-of-war. No evidence was given on behalf of the defendants.

The learned Judge, after adverting to the law as laid down in Kent's Commentaries, vol. 1, marg. p. 142, and the statement of *Story, J.*, in *The Santissima Trinidad* (a), that the law of nations did not prohibit the sending armed vessels, as well as munitions of war, to foreign ports for sale, told the jury that the question which he proposed to submit to them was whether the "Alexandra" was merely in the course of building for the purpose of being delivered in pursuance of a contract, which, in his lordship's opinion, was perfectly lawful; or whether there was any intention that in the port of Liverpool, or any other English port, the vessel should be equipped, fitted out, and furnished or armed for the purpose of aggression. His lordship proceeded to say that the Foreign Enlistment Act did not prohibit the building of

(a) 7 Wheaton's Amer. Rep. 283. 340.

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ships for a belligerent power; that the sale by any person in this kingdom to a belligerent power of any quantity of arms, ammunition or destructive material was not forbidden either by international or municipal law; and if so, why should ships be an exception? which, in his opinion, were not. That if it was lawful for a person to build a ship easily convertible into a man-of-war, and offer it for sale to either of the belligerents, it was lawful for the Confederate States to employ a builder to build a ship of the same description and send it to them. That the object of the statute was not the protection of belligerents, otherwise the legislature would have prohibited the sale of gunpowder; but to prevent the equipment for war, in the ports of this country, of vessels which might possibly come into hostile communication before they passed the neutral line. His lordship then said that he did not propose to leave the jury the question for what service the vessel was intended: that the definition of the word "equip," in Webster's Dictionary, was "to furnish with arms"; and that the words "equip," "furnish," and "fit out," or "arm," meant the same thing. His lordship finally left the question to the jury as follows:—"Was there any intention that, in the port of Liverpool, or in any other port, she should be either equipped, furnished, fitted out, or armed, with the intention of taking part in any contest. If you think the object was to equip, furnish, fit out, or arm that vessel at Liverpool, then that is a sufficient matter. But if you think the object really was to build a ship in obedience to an order, and in compliance with a contract, leaving it to those who bought it to make what use they thought fit of it, then it appears to me that the Foreign Enlistment Act has not been in any degree broken."—The jury found a verdict for the defendants.

The Attorney General, in the present Term, obtained a rule nisi for a new trial on the ground—1st, that the verdict was against the evidence; 2nd, that the verdict was against

the weight of evidence; 3rd, that the learned Lord Chief Baron did not sufficiently explain to the jury the construction and effect of the Foreign Enlistment Act; 4th, that the learned Lord Chief Baron did not leave to the jury the question whether the ship "Alexandra" was or was not intended to be employed in the service of the Confederate States to cruize or commit hostilities against the United States; 5th, that the learned Lord Chief Baron did not leave to the jury the question whether there was any attempt or endeavour to equip, &c.; 6th, that the learned Lord Chief Baron did not leave to the jury the question whether there was knowingly any aiding, assisting, and being concerned in the equipping, &c.; and 7th, that the learned Lord Chief Baron misdirected the jury as to the construction and effect of the 7th section of the Foreign Enlistment Act; against which

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Sir *H. Cairns*, *Karslake*, *Mellish* and *Kemplay* shewed cause (a). — First, as to the construction of the Foreign Enlistment Act, 59 Geo. 3, c. 69 (b). The 7th section (c), upon which the information is founded, is obviously incorrectly worded. If the first line be read according to its strict construction, it indicates the idea that the person is to be within the United Kingdom, though the act may be done by him either within or without the United Kingdom. The information proceeds on the true construction by reading the word "shall" before "within," as collocated in the second branch of the section. Again, the section speaks of employing a ship in the service of one state as a transport or store ship with intent to commit hostilities against another state. It should be observed that the acts prohibited are not

(a) Nov. 17, 18, 19, 20, 21.
Before *Pollock*, C. B., *Bramwell*,
B., *Channell*, B., and *Pigott*, B.

(b) The material clauses are
set out, *post*, p. 455, et seq.

(c) *Post*, p. 458.

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mala per se, but purely offences against positive law, for if the Crown sanctions them, they cease to be unlawful. That consideration renders it necessary to inquire into the history of the legislation and the policy of the legislature in passing the Act; so that, viewing the circumstances which surrounded them, the meaning of their expressions may be ascertained. The preamble (a) shews that the main object of the legislature was to restrain certain acts which might "be prejudicial to, and tend to endanger the peace and welfare of this kingdom." The enlistment of men or the equipping of vessels of war by a neutral state, is an act of which either of the belligerents might complain, and if not redressed would afford a *casus belli*. Then what is the extent of international duty which either of the belligerents may call upon a neutral state to observe? There are two rules of international law which govern this inquiry. First, the *subjects* of a neutral power may lawfully sell, at home, to a belligerent purchaser, or carry themselves to the belligerent powers, arms, ammunition, or other contraband (b) of war, subject to the right of seizure and confiscation: Kent. Com. vol. 1, marg. p. 142; *The Santissima Trinidad* (c). In Twiss on the Law of Nations in Time of War, p. 460, the following passage is cited from Vattel, bk. III., chap. vii., s. 110:—"If a nation" (by which Vattel means the domiciled subjects of a nation) "trades in arms, timber for ship-building, ships and warlike stores, I cannot take it amiss that it sells such things to my enemy, provided it does not refuse to sell them to me also at a reasonable price. It carries on its trade without any design to injure me, and, by continuing it in the same manner as if I were not engaged in war, it gives me no just cause of

(a) *Post*, p. 455.

p. 135.

(b) As to "contraband of war,"
 see Kent Com., vol. 1, marg.

(c) 7 Wheaton Amer. Rep.
 283. 340.

complaint." It is not contrary to the principles of international law, to send from a neutral port a ship unarmed and unequipped for any hostile purpose, and to send before, along with, or after her, out of the same port, another ship with munitions of war on board, though the object may be, when out of the neutral jurisdiction, to transfer the cargo of the latter ship to the former. The second rule of international law is, that the territory of a neutral power must be kept absolutely inviolate from proximate acts of war; and a neutral power would have a right to complain if that inviolability is infringed either by the belligerents or any of its subjects at their instigation. "It is a violation of neutral territory for a belligerent ship to take her station within it, in order to carry on hostile expeditions from thence, or to send her boats to capture vessels beyond it. No use of neutral territory for the purposes of war can be permitted:" 1 Kent Com. marg. p. 118; *The Twee Gebroeders* (a). Bynkershoek (b) makes one exception to the general inviolability of neutral territory, and supposes that if an enemy be attacked on hostile ground, or in the open sea, and flee within the jurisdiction of a neutral state, the victor may pursue him *dum fervet opus*, and seize his prize within the neutral state. Casaregis, and other foreign jurists mentioned by Azuni (c), had a similar doctrine, while D'Abren, Valin, Emerigon, Vattel, Azuni and others maintained the sounder doctrine, that when the flying enemy has entered neutral territory he is placed immediately under the protection of the neutral power: 1 Kent. Com. marg. p. 120. In *The Twee Gebroeders* (a) the distinction is taken between remote uses of a neutral territory, such as procuring provisions and other innocent articles, which the law of nations tolerates, and proximate acts of war. Those being the two

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(a) 3 C. Rob. 162. 164.

(c) Droit Maritime, tom. 2,

(b) Quæst Jur. Pub., lib. 1, chap. iv., art. 1, § 5. 6.

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rules, what conclusion *a priori* would anyone draw from them as to the course of municipal legislation? The law of nations defines a certain line outside the dominions of a state, up to which municipal jurisdiction extends, and beyond which it ceases. According to the rules of international law, the subjects of a neutral state may carry and deliver to a belligerent outside or inside that line, guns, ammunition, ships, or any other articles called "contraband of war." The other belligerent may intercept the supplies, capture the ship, and confiscate the articles as contraband; subject to that, the act may be done without any offence against the principles of international law. Then, *a priori*, it would be expected that the course of municipal legislation would be to restrain the subjects of a neutral power from doing that of which either of the belligerents might complain.

The first Act for that purpose was passed in the year 1794, by the Congress of the United States, and if the construction of the 59 Geo. 3, c. 69, is doubtful, recourse may be had to the history of the American legislation, because the language of the 59 Geo. 3, c. 69, is similar to that of the Act of Congress, and the object of the English legislature was to follow as closely as possible the course of American legislation: Canning's Speeches, vol. 5, p. 50 (a). The occurrences which led to the passing

(a) The following passage was cited from the speech of Mr. Canning, on the 16th April, 1823, on the motion of Lord Althorp, for leave to bring in a bill to repeal the 59 Geo. 3, c. 69.—  
 "If I wished for a guide in the system of neutrality, I should take that laid down by America in the days of the Presidency of Washington, and the Secretaryship of Jefferson. In

1793 complaints were made to the American Government that French ships were allowed to fit out and arm in American ports, for the purpose of attacking British vessels, in direct opposition to the laws of neutrality. Immediately upon this representation the American Government held that such a fitting out was contrary to the laws of neutrality, and orders were issued prohibit-

of the original Act of Congress took place in 1793. The French Republic was constituted in 1793, and one of its first Acts was to send a minister to the United States of America, M. Genet, who instituted the equipment of privateers in American ports to cruise against and capture English vessels, the French Republic having declared war against England. At that time America was at peace with all the world, and the policy of its Government was to reap the advantages which a commercial country might be expected to reap from a state of neutrality in the midst of war. Accordingly, the American Government had to consider how far the acts of the French minister could be put a stop to upon the principles of international law; and, if not, to ascertain how far the municipal law should be called in aid: Jefferson's *Memoirs and Correspondence*, vol. 3, p. 571, ed. N. Y., 1854 (a); Spark's *Collection of the Writings of*

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ing the arming of any French vessels in American ports. At New York a French vessel, fitting out, was seized, delivered over to the tribunals, and condemned. Upon that occasion the government held that such fitting out of French ships in American ports, for the purpose of cruising against English vessels, was incompatible with the sovereignty of the United States, and tended to interrupt the peace and good understanding which subsisted between that country and Great Britain. Here, sir, I contend is the principle of neutrality upon which we ought to act. It was upon this principle that the bill in question was enacted."

(a) The following passage was cited from a letter dated Philadelphia, June 5, 1793, written by Mr. Jefferson, the American Minister, to Monsieur Genet, the

French Minister:—"In a conversation which I had afterwards the honour of holding with you, I observed that one of those armed vessels, the 'Citizen Genet,' had come into this port with a prize; that the President had thereupon taken the case into further consideration, and after mature consultation and deliberation was of opinion that the arming and equipping vessels in the ports of the United States to cruise against nations with whom they are at peace, was incompatible with the territorial sovereignty of the United States; that it made them instrumental to the annoyance of those nations, and thereby tended to compromise their peace; and that he thought it necessary, as an evidence of good faith to them, as well as a proper reparation to the sovereignty of the country, that the

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Washington, vol. 10, p. 345 (a). A circular letter was sent to the collectors of the customs in America, which contained certain rules which are a true exposition of international law : American State Papers, vol. 1, p. 45 (b); 1 Kent Com. marg. p. 122. These rules provided for either case,—whether the equipments in ports of the United States were solely

armed vessels of this description should depart from the ports of the United States.”

(a) The following letter was cited, written on the 7th May, 1793, by Washington, the President of the United States, to Mr. Hamilton, the Secretary of the Treasury:—“Dear Sir, as I perceive there has been some misconception respecting the building of vessels in our ports, which vessels may be converted into armed ones; and as I understand from the Attorney General that there is to be a meeting to-day or to-morrow of the gentlemen on another occasion, I wish to have that part of your circular letter which respects this matter reconsidered by them before it goes out.

“I am not disposed to adopt any measure which may check ship-building in this country; nor am I satisfied that we should too promptly adopt measures in the first instance that are not indispensably necessary. To take fair and supportable ground I conceive to be our best policy, and it is all that can be required of us by the powers at war; leaving the rest to be managed according to circumstances, and the advantages to be derived from them. I am” &c.

(b) The rules contained in the circular letter, as finally settled and signed by Mr. Hamilton, the Secretary of the Treasury, are (so far as material) as follows:—“No armed vessel which has been or shall be *originally fitted out* in any port of the United States by either of the parties at war is henceforth to have asylum in any district of the United States. If any such armed vessel shall appear within your district, she is immediately to be notified to the governor and attorney of the district, which is also to be done in respect to any prize that such armed vessel shall bring or send in. At foot is a list of such armed vessels of the above description as have hitherto come to the knowledge of the executive.

“The purchasing within and exporting from the United States, *by way of merchandise*, articles commonly called contraband, being generally war-like instruments and military stores, is free to all the parties at war, and is not to be interfered with. If our own citizens undertake to carry them to any of those parties, they will be abandoned to the penalties which the laws of war authorize.”

“In case any vessel shall be found in the act of contravening

for the purposes of war, or were of such a doubtful nature that they might be applicable either to commerce or war. If the equipments were solely applicable to war, they were unlawful; if of a doubtful nature, they were lawful.

The American Act passed in the year 1794 was re-enacted with some additions in 1818 (a). By the first

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any of the rules or principles which are the ground of this instruction, she is to be refused a clearance till she shall have complied with what the governor shall have decided in reference to her. Care, however, is to be taken in this, not unnecessarily or unreasonably to embarrass trade, or to vex any of the parties concerned.

"In order that *contraventions* may be the better ascertained, it is desired that the officer who shall first go on board any vessel arriving within your district, shall make an accurate survey of her then condition as to *military equipment*, to be forthwith reported to you, and that prior to her clearance a like survey be made, that any transgression of the rules laid down may be ascertained.

"1. The original arming and equipping of vessels in the ports of the United States, by any of the belligerent parties, for military service, offensive or defensive, is deemed unlawful.

"2. Equipment of merchant vessels by either of the belligerent parties in the ports of the United States, purely for the accommodation of them as such, is deemed lawful.

"3. Equipments in the ports

of the United States of vessels of war in the immediate service of the government of any of the belligerent parties, which, if done to other vessels, would be of a doubtful nature, as being applicable either to commerce or war, are deemed lawful.

"4. Equipments in the ports of the United States, by any of the parties at war with France, of vessels fitted for merchandise and war, whether with or without commissions, which are doubtful in their nature as being applicable either to commerce or war, are deemed lawful.

"5. Equipments of any of the vessels of France in the ports of the United States, which are doubtful in their nature as being applicable to commerce or war, are deemed lawful.

"6. Equipments of every kind in the ports of the United States of privateers of the powers at war with France are deemed unlawful.

7th. "Equipments of vessels in the ports of the United States, which are of a nature solely adapted to war, are deemed unlawful."

(a) *Fifteenth Act of Congress, Sess. 1, chap. 88, April 20, 1818.*
An Act* in addition to the "Act

* This Act re-enacts the Acts of 1794, chap. 50; 1797, chap. 58, and of 1817, chap. 58, with some addition.

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section (a) of the latter Act, if any citizen in the United States shall, within its territories, accept a commission to serve a foreign power against any power with whom the United States are at peace, he shall be deemed guilty of a misdemeanor. By the 2nd section (b), if any person shall, within the United States, enlist himself, or hire another person to enlist himself, or go beyond the limits of the United States with intent to enlist in the service of a foreign power, as a soldier or seaman, he shall be deemed guilty of a misdemeanor. Then follows an exception with respect to persons transiently within the United States.


for the punishment of certain crimes against the United States," and to repeal the Acts therein mentioned.

(a) Sect. 1. "That if any citizen of the United States shall, within the territory or jurisdiction thereof, accept and exercise a commission to serve a foreign prince, state, colony, district, or people in war, by land or by sea, against any prince, state, colony, district, or people with whom the United States are at peace, the person so offending shall be deemed guilty of a high misdemeanor, and shall be fined not more than 2000 dollars, and shall be imprisoned not exceeding three years."

(b) Sect. 2. "That if any person shall, within the territory or jurisdiction of the United States, enlist or enter himself, or hire or retain another person to enlist or enter himself, or to go beyond the limits or jurisdiction of the United States with intent to be enlisted or entered in the service of any foreign prince, state, colony, district, or people, as a soldier, or as a marine or seaman,

on board of any vessel of war, letter of marque, or privateer, every person so offending shall be deemed guilty of a high misdemeanor, and shall be fined not exceeding 1000 dollars, and be imprisoned not exceeding three years: Provided that this Act shall not be construed to extend to any subject or citizen of any foreign prince, state, colony, district, or people, who shall transiently be within the United States, and shall, on board of any vessel of war, letter of marque, or privateer, which at the time of its arrival within the United States, was fitted and equipped as such, enlist or enter himself, or hire or retain another subject or citizen of the same foreign prince, state, colony, district, or people, who is transiently within the United States, to enlist or enter himself to serve such foreign prince, state, colony, district, or people, on board such vessel of war, letter of marque, or privateer, if the United States shall then be at peace with such foreign prince, state, colony, district or people."

The 3rd section (a), which is nearly the same as the 7th section of the 59 Geo. 3, c. 69, enacts "that if any person shall, within the limits of the United States, fit out *and* arm, or attempt to fit out *and* arm, or procure to be fitted out *and* armed, or shall knowingly be concerned in the furnishing, fitting out, or arming of any ship," with intent that such ship shall be employed in the service of a foreign power to cruize or commit hostilities against the subjects of any power with whom the United States are at peace, he shall be deemed guilty of a misdemeanor, and the ship shall be forfeited. The first part of the clause is in the conjunctive, whereas the latter part is in the disjunctive. Then at the word "concerned" another term is introduced, viz., "furnishing." However, if the section means, "You shall not within the United States fit out a ship as a ship of war, intending her to be employed by one belligerent against another," that tallies with the rules laid down by the American Government and affirmed by writers on international law; because, in more enlarged terms, it means "You shall not fit out a ship with any of those distinctive fittings or equipments

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(a) Sect. 3. "That if any person shall within the limits of the United States fit out and arm, or attempt to fit out and arm, or procure to be fitted out and armed, or shall knowingly be concerned in the furnishing, fitting out, or arming of any ship or vessel with intent that such ship or vessel shall be employed in the service of any foreign prince or state, or of any colony, district, or people, to cruize or commit hostilities against the subjects, citizens, or property of any foreign prince or state, or of any colony, district, or people with whom the United States are at peace, or shall issue or deliver a commission within the terri-

tory or jurisdiction of the United States for any ship or vessel, to the intent that she may be employed as aforesaid, every person so offending shall be deemed guilty of a high misdemeanor, and shall be fined not more than \$10,000, and imprisoned not more than three years; and every such ship or vessel, with her tackle, apparel, and furniture, together with all materials, arms, ammunition, and stores, which may have been procured for the building and equipment thereof, shall be forfeited, one-half to the use of the informer, and the other half to the use of the United States.

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which are not ambiguous, but are of use in no ship except a ship of war." The 4th section (*a*) relates to the fitting out and arming by any citizen of the United States of any ship with intent that such ship shall cruize or commit hostilities upon the citizens of the United States. That section is not in the Act of 1794. By the 5th section (*b*), if any person shall, within the United States, increase or augment, or procure to be increased or augmented, or shall knowingly be concerned in increasing or augmenting the force of any ship of war, which at the time of her arrival within the United

(*a*) Sect. 4. "That if any citizen or citizens of the United States shall, without the limits thereof, fit out and arm, or attempt to fit out and arm, or procure to be fitted out and armed, or shall knowingly aid or be concerned in the furnishing, fitting out, or arming, any private ship or vessel of war, or privateer, with intent that such ship or vessel shall be employed to cruize or commit hostilities upon the citizens of the United States, or their property, or shall take the command of, or enter on board of any such ship or vessel for the intent aforesaid, or shall purchase any interest in any such ship or vessel, with a view to share in the profits thereof, such person so offending shall be deemed guilty of a high misdemeanor, and fined not more than 10,000 dollars, and imprisoned not more than ten years; and the trial for such offence, if committed without the limits of the United States, shall be in the district in which the offender shall be apprehended or first brought."

(*b*) Sect. 5. "That if any per-

son shall, within the territory or jurisdiction of the United States, increase or augment, or procure to be increased or augmented, or shall knowingly be concerned in increasing or augmenting the force of any ship of war, cruiser, or other armed vessel, which, at the time of her arrival within the United States, was a ship of war, or cruiser, or armed vessel, in the service of any foreign prince, or state, or of any colony, district, or people, or belonging to the subjects or citizens of any such prince, or state, colony, district, or people, the same being at war, with any foreign prince or state, or of any colony, district, or people with whom the United States are at peace, by adding to the number of the guns of such vessel, or by changing those on board of her, for guns of a larger calibre, or by the addition thereto of any equipment solely applicable to war, every person so offending shall be deemed guilty of a high misdemeanor, shall be fined not more than 1000 dollars, and be imprisoned not more than one year.

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States was a ship of war in the service of a foreign power, at war with a foreign power with whom the United States are at peace, by adding to the guns of such vessel or by changing those on board for guns of a larger calibre, or by addition thereto of *any equipment solely applicable to war*, shall be deemed guilty of a misdemeanor. That section throws light upon the legislation. It deals with a ship as to whose destination there can be no doubt; a ship with letters of marque, or a privateer, or a national ship of war, and it is declared unlawful to augment her force by adding to or changing her guns, but it is lawful to furnish her with equipments not solely applicable to war. That is what the rules prescribe, viz., to look at the character of the equipment. It is not necessary to advert to the 6th (a), 7th (b), 8th (c) and 9th sections (d). The 10th section (e) (which was not in the Act of 1794) requires the owners or consignees of every armed ship sailing from the ports of the United States, *belonging wholly or in part to citizens thereof*, to enter in bond with sureties, in

(a) Sect. 6 prohibits persons from setting on foot within the United States any military expedition against a friendly power.

(b) Sect. 7. That the district Courts shall take cognizance of complaints, by whomsoever instituted, in cases of captures made within the waters of the United States or within a marine league of the coasts or shores thereof.

(c) Sect. 8 empowers the President of the United States to employ the forces or the militia for suppressing such expeditions.

(d) Sect. 9 empowers the President of the United States to employ the forces or militia to compel the departure of vessels.

(e) Sect. 10. "That the owners or consignees of every armed ship or vessel sailing out of the ports of the United States, belonging wholly or in part to citizens thereof, shall enter into bond to the United States, with sufficient sureties, prior to clearing out the same, in double the amount of the value of the vessel and cargo on board, including her armament, that the said ship or vessel shall not be employed by such owners to cruize or commit hostilities against the subjects, citizens, or property of any foreign prince or state, or of any colony, district, or people with whom the United States are at peace."

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double the amount of the vessel and cargo, that the ship shall not be employed to cruize or commit hostilities against any foreign power with whom the United States are at peace. But before a collector of customs can establish a right to demand a bond, he must shew that the ship is an armed ship. The 11th section (a) (which was not in the Act of 1794) requires the collectors of customs to detain "any vessel *manifestly built for warlike purposes*," not generally, but of which "the cargo shall principally consist of arms and munitions of war, when the number of men shipped on board or other circumstances shall render it probable that such vessel is intended to be employed" against some foreign power at peace with the United States. That, again, throws light upon the general object and scope of the legislation, because if the intention was to render it an offence to do anything to a ship in a port of the United States which might afterwards be available when she became a ship of war, the collector of customs would have been authorized to detain the ship, though she had no warlike equipments, if she was manifestly built for warlike purposes. But he has no right to detain a ship or to require a bond from its owner on mere suspicion or proof that she might thereafter be turned into a ship of war.

A construction has been put on this Act of Congress by several American authorities. In the case of *Moodie v.*

(a) Sect. 11. "That the collectors of the customs be, and they are hereby, respectively, authorized and required to detain any vessel manifestly built for warlike purposes, and about to depart the United States, of which the cargo shall principally consist of arms and munitions of war, when the number of men shipped on board or other circumstances shall render it probable that such vessel is intended to be employed

by the owner or owners to cruize or commit hostilities upon the subjects, citizens, or property of any foreign prince or state, or of any colony, district, or people with whom the United States are at peace, until the decision of the President be had thereon, or until the owner or owners shall give such bond and security as is required of the owners of armed ships by the preceding section of this Act.

"*The Ship Brothers*" (a) the question was whether the privateer which captured the prize, received in an American port additional equipments solely applicable to war. In *The United States v. Guinet* (b) one question was whether there had been an equipment, within the terms of the Act of Congress, within the American jurisdiction, and both the Judge and council agreed that the question turned upon whether there had been a conversion of the ship into a ship of war by virtue of those equipments. In *The United States v. Quincy* (c) the fitting out was clearly of a warlike character, and the only point decided was that, upon an indictment under the 3rd section of the American Act, the jury need not find that the ship was armed or in a condition to commit hostilities.

Then with respect to the 59 Geo. 3, c. 69. In the year 1713, and again in 1721, the Judges, in answer to a question by the House of Lords, expressed their opinion that the Crown had no power to prohibit the building of ships of war or of great force for foreigners, in any part of his Majesty's dominions (d). The circumstances under which 59 Geo. 3, c. 69, passed are described in Alison's *Second History of Europe*, vol. 1, chap. 4, sect. 95 (e), and

(a) Bee's Amer. Rep. 76.

(b) Wharton's Amer. State Trials, 93.

(c) 6 Peter's Amer. Rep. 445. 469.

(d) Fortescue, 388.

(e) The following passages were cited:—"Ever since the contest between the splendid colonies of Spain and the mother country had begun in 1810, it had been regarded with warm interest in Great Britain;—partly in consequence of the strong and instinctive attachment

of its inhabitants to the cause of freedom, and sympathy with all who are engaged in asserting it; partly in consequence of extravagant expectations formed and fomented by interested parties, as to the vast field that, by the independence of those colonies, would be opened to British commerce and enterprise. . . . Not only did great numbers of the peninsular veterans, officers and men, go over in small bodies, and carry to the insurgents the benefit of

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Canning's Speeches, vol. 4, p. 154, 159 (a). The evil intended to be remedied was pointed out by Sir *S. Shepherd*

their experience and the prestige of their fame, but a British adventurer, who assumed the title of Sir M'Gregor M'Gregor, collected a considerable expedition in the harbours of this country, with which, in British vessels and under the British flag, he took possession of Porto Bello in South America, then in the undisturbed possession of a Spanish force, a country at peace with Great Britain. This violent aggression led to strong remonstrance on the part of the Spanish government, in consequence of which Government brought in a Foreign Enlistment Bill, which led to violent debates in both Houses of Parliament." After referring to debates in parliament, and the doctrine laid down in Martens, "Droit des Gens," which Lord Lansdowne had cited, the author proceeds:—"Admitting that the doctrine of Martens, on which Lord Lansdowne so strongly rested, is well founded, and that it is no violation of neutrality for one belligerent to be allowed to levy men in the dominions of a neutral power, that was a very different thing from the course which was now adopted in Great Britain in regard to the South American insurgents. There was no levying of men by isolated foreign agents, as in the wars of the Duke of Alva or Gustavus Adolphus. Joint stock companies were formed; loans to an enormous extent granted to the governments

of the insurgent states at a very high rate of interest, provided for by retaining 20*l.* or 30*l.* per cent. off the sum subscribed; and great expeditions sent out which at last amounted to 8000 and 10,000 men, fully armed and equipped by the companies engaged in the undertaking, in order to secure for them the payment of their dividends."

(a) The following passages were cited:—"What would be the result if the House (of Commons) refused to arm Government with the means of maintaining neutrality? Government would then possess no other power than that which they exerted two years ago, and exerted in vain. The House would do well to reflect seriously on this before they placed Government in so helpless a situation. Did the honorable and learned gentleman really think it would be a wholesome state of things that troops for foreign service should be parading about the streets of the metropolis without any power on the part of Government to interfere to prevent it? At that very moment such was the case in some parts of the empire, and he had little doubt that in a very short time the practice would be extended to London." . . . "Ministers did not apply to Parliament for this aid until they had tried, without effect, all the means which were in their power; if they were

in introducing the bill: Hansard's Parliamentary Debates, vol. 40, p. 364 (a). The title (b) of the 59 Geo. 3, c. 69, shews the object of the enactment, and the preamble (c) tallies with its history. The first section repeals certain acts of parliament for preventing enlisting in foreign service.

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not now vested with the requisite authority, if before next summer the country should exhibit the scandalous and disgraceful scene of lawless bands of armed men raised for foreign service, parading through the streets, let not ministers be blamed; for they had warned Parliament of the danger, and had called on them to prevent it."

(a) The following passages were cited:—"It was extremely important, for the preservation of neutrality, that the subjects of this country should be prevented from fitting out any equipments, not only in the ports of Great Britain and Ireland, but also in the other ports of the British dominions, to be employed in foreign service. The principle in this case was the same as in the other, because by fitting out armed vessels, or by supplying the vessels of other countries with warlike stores, as effectual assistance might be rendered to a foreign power as by enlistment in their service. In this second provision of the bill, two objects were intended to be embraced,—to prevent the fitting out of armed vessels, and also to prevent the fitting out or supplying other ships with warlike stores in any of his Majesty's ports. Not that such vessels might not receive provisions in any port in the British dominions; but the object

of the enactment was to prevent them from shipping warlike stores, such as guns and other things obviously and manifestly intended for no other purpose than war."

(b) An Act to prevent the Enlisting or Engagement of his Majesty's Subjects to serve in Foreign Service, and the fitting out or equipping, in his Majesty's Dominions, Vessels for warlike Purposes, without his Majesty's Licence.

(c) Whereas the enlistment or engagement of his Majesty's subjects to serve in war in foreign service, without his Majesty's licence and the fitting out and equipping and arming of vessels by his Majesty's subjects, without his Majesty's licence, for warlike operations in or against the dominions or territories of any foreign prince, state, potentate, or persons exercising or assuming to exercise the powers of government in or over any foreign country, colony, province, or part of any province, or against the ships, goods, or merchandise of any foreign prince, state, potentate, or persons as aforesaid, or their subjects, may be prejudicial to and tend to endanger the peace and welfare of this kingdom: And whereas the laws in force are not sufficiently effectual for preventing the same: Be it therefore enacted, &c.

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The first branch of the second section (a) declares that if any *natural-born subject* shall enlist or agree to enlist or

(a) Sect. 2. "And be it further declared and enacted, That if any natural-born subject of his Majesty, his heirs and successors, without the leave or licence of his Majesty, his heirs or successors, for that purpose first had and obtained, under the sign manual of his Majesty, his heirs or successors, or signified by order in council, or by proclamation of his Majesty, his heirs or successors, shall take or accept, or shall agree to take or accept, any military commission, or shall otherwise enter into the military service as a commissioned or non-commissioned officer, or shall enlist or enter himself to enlist, or shall agree to enlist or to enter himself to serve as a soldier, or to be employed or shall serve in any warlike or military operation, in the service of or for or under or in aid of any foreign prince, state, potentate, colony, province, or part of any province or people, or of any person or persons exercising or assuming to exercise the powers of government in or over any foreign country, colony, province, or part of any province or people, either as an officer or soldier, or in any other military capacity; or if any natural-born subject of his Majesty shall, without such leave or licence as aforesaid, accept, or agree to take or accept, any commission, warrant, or appointment as an officer, or shall enlist or enter himself, or shall agree to enlist or enter himself, to serve as a sailor or marine, or to be employed or engaged,

or shall serve in and on board any ship or vessel of war, or in and on board any ship or vessel used or fitted out, or equipped or intended to be used for any warlike purpose, in the service of or for or under or in aid of any foreign power, prince, state, potentate, colony, province, or part of any province or people, or of any person or persons exercising or assuming to exercise the powers of government in or over any foreign country, colony, province, or part of any province or people; or if any natural-born subject of his Majesty shall, without such leave and licence as aforesaid, engage, contract, or agree to go, or shall go to any foreign state, country, colony, province, or part of any province, or to any place beyond the seas, with an intent or in order to enlist or enter himself to serve, or with intent to serve in any warlike or military operation whatever, whether by land or by sea, in the service of or for or under or in aid of any foreign prince, state, potentate, colony, province, or part of any province or people, or in the service of or for or under or in aid of any person or persons exercising or assuming to exercise the powers of government in or over any foreign country, colony, province, or part of any province or people, either as an officer or a soldier, or in any other military capacity, or as an officer or sailor, or marine, in any such ship or vessel as aforesaid, although no enlisting money

serve in foreign service, military or naval, he shall be guilty of a misdemeanor. The second branch of the section creates another offence which extends to all persons, but the act must be committed within her Majesty's dominions, viz., the hiring, retaining, engaging, or procuring others to enlist. That enactment has no reference to international law. Its object is to prevent any subject of the Queen from entering into the military service of a foreign power, which may be inconsistent with the allegiance he owes to his sovereign. The motive for serving in the foreign army is immaterial: it may be wholly irrespective of war, and merely with the view of forming part of the standing army of the state; but the legislature has said that it shall not be done without the leave of the Crown. The 3rd, 4th, 5th and 6th sections are not material to the present questions. The latter terminates a series of provisions having a wider and

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or pay or reward shall have been or shall be in any or either of the cases aforesaid actually paid to or received by him, or by any person to or for his use or benefit; or if any person whatever, within the United Kingdom of Great Britain and Ireland, or in any part of his Majesty's dominions elsewhere, or in any country, colony, settlement, island, or place belonging to or subject to his Majesty, shall hire, retain, engage, or procure, or shall attempt or endeavour to hire, retain, engage, or procure, any person or persons whatever to enlist, or to enter or engage to enlist, or to serve or to be employed in any such service or employment as aforesaid, as an officer, soldier, sailor, or marine, either in land or sea service, for or under or in aid of any foreign prince, state, potentate, colony, province, or part

of any province or people, or for or under or in aid of any person or persons exercising or assuming to exercise any powers of government as aforesaid, or to go or to agree to go or embark from any part of his Majesty's dominions, for the purpose or with intent to be so enlisted, entered, engaged, or employed as aforesaid, whether any enlisting money, pay, or reward shall have been or shall be actually given or received, or not; in any or either of such cases, every person so offending shall be deemed guilty of a misdemeanor, and upon being convicted thereof, upon any information or indictment, shall be punishable by fine and imprisonment, or either of them, at the discretion of the Court before which such offender shall be convicted."

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a different object from prohibiting the aiding of one belligerent against another. The seventh section (a) is the expression of international law, and should be read with

(a) Sect. 7. "That if any person, within any part of the United Kingdom, or in any part of his Majesty's dominions beyond the seas, shall, without the leave and licence of his Majesty for that purpose first had and obtained as aforesaid, equip, furnish, fit out, or arm, or attempt or endeavour to equip, furnish, fit out, or arm, or procure to be equipped, furnished, fitted out, or armed, or shall knowingly aid, assist, or be concerned in the equipping, furnishing, fitting out, or arming of any ship or vessel with intent or in order that such ship or vessel shall be employed in the service of any foreign prince, state, or potentate, or of any foreign colony, province, or part of any province or people, or of any person or persons exercising or assuming to exercise any powers of government in or over any foreign state, colony, province, or part of any province or people, as a transport or store ship, or with intent to cruize or commit hostilities against any prince, state, or potentate, or against the subjects or citizens of any prince, state, or potentate, or against the persons, exercising or assuming to exercise the powers of government in any colony, province, or part of any province or country, or against the inhabitants of any foreign colony, province, or part of any province or country, with whom his Majesty shall not then be at war; or shall, within the United Kingdom, or

any of his Majesty's dominions or in any settlement, colony, territory, island, or place belonging or subject to his Majesty, issue or deliver any commission for any ship or vessel, to the intent that such ship or vessel shall be employed as aforesaid, every such person so offending shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof, upon any information or indictment, be punished by fine and imprisonment, or either of them, at the discretion of the Court in which such offender shall be convicted; and every such ship or vessel, with the tackle, apparel, and furniture, together with all the materials, arms, ammunition, and stores, which may belong to or be on board of any such ship or vessel, shall be forfeited; and it shall be lawful for any officer of his Majesty's customs or excise, or any officer of his Majesty's navy, who is by law empowered to make seizures, for any forfeiture incurred under any of the laws of customs or excise, or the laws of trade and navigation, to seize such ships and vessels aforesaid, and in such places and in such manner in which the officers of his Majesty's customs or excise and the officers of his Majesty's navy are empowered respectively to make seizures under the laws of customs and excise, or under the laws of trade and navigation; and that every such ship and vessel, with the tackle, apparel,

the light of it. That section contains no prohibition against building a ship, as distinguished from "equipping, furnishing and fitting out, or arming." Its language assumes that there is a ship in existence to which something is to be superadded, either equipping, furnishing, fitting out, or arming. That is clear from the latter part of the section, which says, that "every such ship or vessel, with the tackle, apparel and furniture, together with all the materials, arms, ammunition and stores which may belong to, or be on board of any such ship or vessel, shall be forfeited;" and then the section proceeds to say, that every such ship or vessel, &c., may be prosecuted and condemned in like manner as ships or vessels for breach of the customs law. Again, where the section speaks of issuing or delivering a commission, these words occur, "for any ship or vessel, to the intent that such ship or vessel shall be employed as aforesaid." If the argument is to be advanced that the moment it is discovered that any part of the structure of a vessel is suitable for a vessel of war, and not for a vessel of commerce, there is an offence within the Act, that argument would go to this extent, that if the keel of a ship was laid down with intent that she should be a ship of war, that would be a misdemeanor and a forfeiture of the keel. But the legislature never intended to prohibit the building of ships for belligerents, for it is not every description of equipment, furnishing and fitting out, which is forbidden, but only an equipment with intent or in order that the vessel may be used as a transport, or

and furniture, together with all the materials, arms, ammunition, and stores which may belong to or be on board of such ship or vessel, may be prosecuted and condemned in the like manner and in such Courts as ships or

vessels may be prosecuted and condemned for any breach of the laws made for the protection of the revenues of customs and excise, or of the laws of trade and navigation.

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cruise or commit hostilities. There is nothing in the 59 Geo. 3, c. 69, which prohibits the hiring a ship or room in a ship, for the purpose of carrying warlike stores, to be delivered either to a ship abroad or at a port abroad. There is nothing which indicates that the building and fitting out of a class of ships, well known in war and called "despatch boats," is intended to be prohibited, and there is nothing which forbids the building the hull of a ship, and towing it out of the jurisdiction of the neutral state into a belligerent port. Suppose France and Russia at war and England neutral, a ship-builder in England, employed by France, might complete the hull of a vessel of war, and have it towed to a French port, and the rigging, sails, guns and munition of war might be sent to that port from any port in England, subject to capture by the other belligerent. A ship-builder in England might lawfully put on the ship a steam-engine, sails, or anything which would enable her to navigate the Channel without the assistance of a tow-boat. That would not be an equipping, furnishing, or fitting out as a ship of war; for the mere addition of the means of propulsion would not make her a ship of war, when she was not one before. According to the argument for the Crown, the providing an anchor or fixing a lightning conductor to the hull of a vessel would be an equipping. If building is not forbidden by the Act, the words, "equipping, furnishing, fitting out, or arming, must be *diversi generis*; for upon no sound principle of reasoning can so unmeaning an object be assigned to the Act, as to suppose that it does not forbid the building of the hull of a ship, but forbids something of the same character wholly unconnected with building a ship of war. But if the words "equip, furnish, fit out, or arm," be construed as *ejusdem generis*, the last giving a complexion to the whole, the object of the legislature is intelligible, viz., not to prohibit building or anything

in the nature of building, but something which would enable the ship to be used as a ship of war. The meaning of "equip" must vary according to the description of vessel. In the case of a whaler, harpoons are part of the equipment. The 7th section is a prohibition to this extent. "No person within her Majesty's dominions shall equip a ship as a ship of war, with intent or in order that it shall be used by one belligerent against another. It is still lawful to send to a foreign state, or deliver in this country, an armed vessel, if the intention of the party receiving it is not to use it for hostile purposes, but as a model for fitting up ships of war. Therefore, the ingredients of the offence are threefold; first, the act must be committed within her Majesty's dominions: secondly, there must be an equipment, or such as would enable the ship to cruise and commit hostilities of a warlike character, and thirdly, an intention, on the part of some person who has a control over the ship, that it shall be used by one belligerent against another. The intention must be fixed, not conditional or contingent and dependent on future arrangements: *The United States v. Quincy* (a). The 8th section (b) of the 59 Geo. 3, c. 69,

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(a) 6 Peters, Amer. Rep. 445.

(b) Sect. 8. "That if any person in any part of the United Kingdom of Great Britain and Ireland, or in any part of his Majesty's dominions beyond the seas, without the leave and licence of his Majesty for that purpose first had and obtained as aforesaid, shall, by adding to the number of the guns of such vessel, or by changing those on board for other guns, or by the addition of any equipment for war, increase or augment, or procure to be increased or augmented, or shall be knowingly

concerned in increasing or augmenting the warlike force of any ship or vessel of war, or cruiser, or other armed vessel which at the time of her arrival in any part of the United Kingdom, or any of his Majesty's dominions, was a ship of war, cruiser, or armed vessel in the service of any foreign prince, state, or potentate, or of any person or persons exercising or assuming to exercise any powers of government in or over any colony, province, or part of any province or people belonging to the subjects of any such prince, state, or potentate, or to the in-

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which is similar to the 5th section of the Act of Congress, contemplates the case of a ship of war in the service of one of the belligerents coming into a port in this country. But all equipment is not prohibited, only an addition to her warlike force; if she has suffered sea damage or been disabled in action with the enemy, it is lawful to repair her. It is also lawful to furnish her with provisions and coals. The 7th section should receive the same construction as the 8th, except that the latter applies to a ship already in the service of the enemy, the former to an unarmed ship intended for that service. The argument for the Crown would lead to this absurdity, that the 7th section prohibits all equipments, whether warlike or not, and the 8th section allows a ship armed with intent to cruize and commit hostilities to receive any equipment, provided it is not of a warlike character.

Then, with respect to the words in the 7th section, "or attempt or endeavour to equip," &c., "or procure to be equipped," &c., or knowingly aid, assist, or be concerned in the equipping," &c. The "attempt or endeavour" must be to do an act which, if consummated, would be an offence within the former part of the section. Therefore assuming that the offence is to equip in her Majesty's dominions, in a warlike manner, a ship to be used by one belligerent to cruize and commit hostilities against another, the attempt or endeavour must be to equip in that manner a ship to be so used. Here it was never suggested that beyond what was done to the "Alexandra" at the time of the seizure, anything of

habitants of any colony, province, or part of any province or country under the control of any person or persons so exercising or assuming to exercise the powers of government, every such person so offending shall be deemed guilty of a misdemeanor, and

shall, upon being convicted thereof, upon any information or indictment, be punished by fine and imprisonment, or either of them, at the discretion of the Court before which such offender shall be convicted.

a different character was to be done to her before she left the jurisdiction. "Procure to be equipped," means the doing the act by procuring another to do it. "Knowingly aid, assist, or be concerned in the equipping," means the being concerned either in that which is a complete equipment or which would have been complete if not interrupted. A person merely working on the vessel would not commit an offence within the Act. An act of parliament which creates a misdemeanor, and in addition the forfeiture of valuable property, should receive a strict construction. An extreme case has been put of two ships, the one unequipped, the other having on board implements of war, sailing together from a port in this country, and when beyond the neutral territory, the implements of war being transferred from one ship to the other, which then becomes a ship of war, and it is asked would not that be an evasion of the Act? But it is a wrong mode of construing a penal statute to extend its provisions beyond what the legislature intended because it may by possibility be evaded. Evasion means avoiding the commission of the offence, and why should a man be punished for avoiding committing it (a)? A jury would have to determine what was the "equipment." Was it the construction within the workshops of articles which were never put on board within the neutral territory, or the transfer of those articles to the ship beyond the neutral territory? If it be said that the preparation, within the neutral territory,

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(a) They referred to the following passage in a note written on the 16th of October, 1862, by Lord Russell to Mr. Adams, the American Ambassador, acknowledging the receipt of further evidence as to the gunboat "Alabama."*—"With reference to your observations with regard to the

infringement of the Enlistment Act, I have to remark, that it is true that the Foreign Enlistment Act, or any other Act of the same purpose, can be evaded by very subtle contrivances; but her Majesty cannot on that account go beyond the letter of the existing law."

* As to this vessel, see *post*, p. 467, note (a).

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of an armament for a ship is the furnishing that ship with the armament, that would equally apply although the ship never came within the neutral territory, and consequently there was none to be forfeited. Suppose an indictment for arming a ship in contravention of the act of parliament, would that be supported by proof that in her Majesty's dominions there was a particular store or repository, within which a certain armament had been prepared for the ship, but which was to be put on board beyond her Majesty's dominions? The answer would be, that is not an arming of the ship. If so with regard to armament, it would be the same with regard to equipment, furnishing and fitting out. If it were alleged that a man furnished a house, would that allegation be supported by proof that the house had no furniture in it, but that some had been ordered which was set apart at a repository with the view of furnishing the house at some future time? It is said that the ports of this country ought not to be used as arsenals for belligerent powers. If that means that the ports of this country ought not to be used for furnishing belligerent ships with implements of war, it is conceded; but if more than that be meant the proposition is not correct. According to the popular meaning of the words, the ports of this country may practically be turned into arsenals for belligerents. The law does not prevent a belligerent power using in this country a manufactory of arms with the view of shipping them; nor having a manufactory of arms in any seaport and making guns, firearms, shot and shells, and conveying them on board a freighted ship to a foreign port, subject to capture as contraband of war.

In the absence of all authority (a) upon the construction

(a) The Lord Chief Baron telli, who was tried on the 5th  
 mentioned the case of one Grana- July, 1849, at the Central Cri-

of the 59 Geo. 3, c. 69, reference may be made, as matter of history, to cases of this kind which were the subject of discussion and consideration, and as to which proceedings might have been taken, if they can be taken where there is no warlike equipment of the ship. In the year 1830, at the time of the contest between the supporters of Don Miguel and the Queen of Portugal, a number of Portuguese refugees came to Plymouth, where they hired a ship and sailed for Terceira. They exported from this country in another ship a quantity of arms and munition of war, which were transferred to the former ship in the waters of Terceira. The Government of this country directed the ships of war in those waters to intercept and fire upon one of the ships which had so left. The matter became the subject of discussion in Parliament, and the Government attempted to justify its conduct because a breach of the Foreign Enlistment Act had been committed, for although the warlike armament was not on board the ship when she left this country, it was sent in another ship with the intention of being transferred to her. But that doctrine was repudiated by Mr. Huskisson, who was a minister at the time the Foreign Enlistment Act passed: Huskisson's Speeches, vol. 3, p. 559 (a). The statement in Parlia-

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minal Court, before *Coltman, J.*, for fitting out in this country ships of war to be employed against the government of the King of Naples in Sicily. The defendant was acquitted. The case is not reported.

(a) The following passages were cited:—"It might be supposed from my right honorable friend's remarks that during the fifteen years we have been at peace our neutrality had never before been

violated. Has my right honorable friend then forgotten the repeated complaints made by Turkey, and has he forgotten that to these complaints we constantly replied, 'We will preserve our neutrality within our dominions, but we will go no further?' Turkey did not understand our explanation, and thought we might summarily dispose of Lord Cochrane and those other subjects of his Majesty who were assisting



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ment on the 27th of March, 1863, of the then Solicitor General with respect to vessels called the "Oreto" (a) and

the Greeks. To its remonstrances Mr. Canning replied (and my right honorable friend being then a colleague of Mr. Canning must be considered to be a party to his opinions), 'Arms may leave this country as matter of merchandise; and however strong the general inconvenience, the law does not interfere to stop them. It is only when the elements of armaments are combined that they come within the purview of the law, and if that combination does not take place until they have left this country, we have no right to interfere with them.' Those were the words of Mr. Canning, who extended the doctrine to steam vessels and yachts that might afterwards be converted into vessels of war, and they appear quite consistent with the acknowledged law of nations."

(a) The following passages were cited:—"The 'Oreto' was made the subject of due representation only once before she left this country, because she sailed from Liverpool on the 22nd of March, clandestinely, as did the 'Alabama'; and it was only on that same day that a conversation took place between Mr. Adams and Lord Russell, which might have led to her detention if she had not gone. On the 18th of February the first and only previous information communicated to our Government was given by Mr. Adams; he stated a case which clearly called for inquiry.

Accordingly, the Commissioners of Customs were directed to make an inquiry; they did so, and on the 22nd of February they reported that circumstances worthy of credit tended to shew that the 'Oreto' was going, or, at all events, was credibly represented to be going, to Italy, and not to America, and not a particle of evidence had been offered to the contrary. She was not then fitted for the reception of guns, and had nothing on board but coals and ballast. There was, consequently, nothing to justify her detention—nothing but vague rumours and suspicions. No further representation was made, and the 'Oreto' sailed on the 22nd of March. What then happened? The circumstances of her departure, and the contemporaneous representation made by Mr. Adams to our Government, made it probable that she was really intended for the Confederate States, and that our officers had been imposed upon. Still the case was not clear; there was nothing proved to have been done in England, which a Court of law would certainly have construed as a violation of the Foreign Enlistment Act. Nevertheless, our Government immediately sent orders to Nassau, whither she was understood to have gone; and when she arrived there, she was watched. Upon the appearance of a delivery of stores, which appeared to be munitions of war,

the "Alabama" (*a*), may also be referred to as regards the construction of the Act: Hansard's Parliamentary Debates, vol. 170, p. 50. The statement in Parliament of Lord Palmerston, respecting the "Alabama," draws a distinction between the intended destination of a ship which may be matter of suspicion, and the fact patens ad oculos of the actual condition of the ship: Hansard's Parliamentary Debates, vol. 170, p. 91 (*b*).—They also referred

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into the 'Oreto' while in our waters, although the case was doubtful, and it was questionable whether the evidence would prove sufficient, still, to shew our good faith, we strained a point, and acting upon some evidence, the 'Oreto' was seized. What was the result? She was tried and acquitted, the evidence not being sufficient."

(*a*) The following passages were cited—"On the 1st of July, the Commissioners made their report to Lord Russell. They said it was evident the ship was a ship of war. It was believed, and not denied, that she was built for a foreign Government; but the builders would give no information about her destination, and the Commissioners had no other reliable source of information upon that point. Were our Government wrong in not seizing the vessel then? The circumstances disclosed in a case tried before Justice Story were so far exactly the same as those which occurred in the case of the 'Alabama'; and in the absence of any further evidence the seizure of that ship would have been altogether unwarrantable by law. She might have been legitimately

built for a foreign Government, and though a ship of war she might have formed a legitimate article of merchandise even if meant for the Confederate States. . . . What is alleged against us? What is the extent of the acts committed even by individual subjects of this country which can be considered contrary to any law of our own? Why the building of these two particular ships" (the "Oreto" and the "Alabama"). "If our law failed to reach them while they were within our jurisdiction, and if nothing was done by them in our ports or in our waters which was against international law, how can we be held responsible for their subsequent proceedings when on the high seas? It was not till the 'Alabama' reached the Azores, that she received her stores, her captain, or her papers, and that she hoisted the Confederate flag. It is not true that she departed from the shores of this country as a ship armed for war."

(*b*) "I have myself great doubts whether, if we had seized the 'Alabama,' we should not have been liable to considerable damages. It is generally known

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to the decree of the Judge of the Vice Admiralty Court of the Bahamas in the case of *Regina v. The British Steamship Oreto*, seized for an alleged breach of the Foreign Enlistment Act.

[They argued, secondly, that the verdict was not against the evidence, or against the weight of evidence. During this branch of the argument the question was mooted whether the claimants could have been called as witnesses; and reference was made to *The Attorney General v. Radloff* (a), 16 & 17 Vict. c. 122, s. 15, and 20 & 21 Vict. c. 62, s. 14. The opinion of the Court in *The United States v. Quincy* (b) was referred to upon the point whether there was evidence of intent to equip.]

Thirdly, there was no misdirection. In the case of *Regina v. Russell* (c), Crompton, J., said that it was dangerous to pick out particular expressions from a Judge's summing up, and criticise them verbally, when he is substantially correct in the direction he gives to the jury. It being admitted that the "Alexandra" was not armed, the question was, first, whether there was any equipment within the Act, that is to say, an equipment of a warlike character; secondly, whether there was an intent that the ship so equipped should be used to cruise and commit hostilities. Four propositions are deducible from the direction of the Lord Chief Baron: first, that *building* a ship, as distinguished from equipping, fitting out, furnishing, and arming, is not an offence within the 59 Geo. 3, c. 69, although the ship might be easily converted into a ship of

that she sailed from this country unarmed, and not properly fitted out for war, and that she received her armament, equipment, and crew in a foreign port. Therefore, whatever suspicions we may have had (and they were well founded, as it afterwards turned

out,) as to the intended destination of the vessel, her condition at that time would not have justified a seizure."


(a) 10 Exch. 84.

(b) 6 Peter's Amer. Rep. 445.
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(c) 3 E. & B. 942.

war; secondly, that the "Alexandra" was clearly not armed, and that it was for the jury to say whether she was equipped, fitted out, or furnished or intended so to be, within her Majesty's dominions; thirdly, that the equipment, furnishing, or fitting out, must be of a warlike character; fourthly, that it was for the jury to say whether there was an intent to employ the ship to cruize and commit hostilities.—Those propositions are substantially correct.

Moreover, in a proceeding of this kind, where a verdict has been found for the defendant, a new trial cannot be granted on the ground of omission to direct the jury, or that the verdict is against the weight of evidence, or unsatisfactory, but only on the ground of positive misdirection. In a proceeding purely criminal, a new trial cannot be granted on any ground; but where the proceeding, though in form civil, is in substance penal, it can only be granted on the ground of misdirection: *Brook v. Middleton* (a); *Hall v. Green* (b). The only authority to the contrary is a note to the case of *Robinson, qui tam, v. Lequesne*, in Bunbury's Reports (c). This is as much a penal proceeding as a qui tam action. [*Channell, B.*—In *The Attorney General v. Rogers* (d) it was laid down that "the Court has authority to, and will, grant a new trial in a penal action, though the verdict be for the defendant, where they are satisfied that the verdict is in contravention of law, whether the error has arisen from the misdirection of the Judge, or from a misapprehension of the law by the jury, or from a desire on their part to take the exposition of the law into their hands."]

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The Attorney General, The Solicitor General, The Queen's Advocate, Locke and T. Jones, in support of the rule.—The

(a) 10 East, 268.

(c) Page 253.

(b) 9 Exch. 247.

(d) 11 M. & W. 670.

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Foreign Enlistment Act, 59 Geo. 3, c. 69, was not the exponent of any antecedent national obligations which this country owed to any foreign power, but a mere matter of municipal law; and no state could have required this country, upon any principle of international law, to prohibit what is declared unlawful by that Act. The rules of international law afford very little, if any, guide to the interpretation of the Act. International law does not prohibit the delivery of contraband articles within the neutral territory, the neutral waters, or any part of the line outside. Apart from municipal legislation, a ship completely armed and equipped might be sold within the neutral territory, and a belligerent would have no right, upon any principle of international law, to complain of it: Wheaton's Law of Nations, p. 312, 1st ed. (a). It can make no difference whether the ship is constructed and delivered under a contract, or, being ready

(a) The passage cited is as follows:—"Lampredi then proceeds to consider an idle question raised by Galiani, 'whether the conventional law of nations, interdicting the trade with the enemy in articles contraband of war, extends to the sale of the same articles within the neutral territory?' Galiani pretends that it does, and that a ship, for example, built and armed for war in a neutral port, cannot be there lawfully sold to a belligerent. Lampredi takes a great deal of superfluous pains to fortify, both by reason, and an appeal to the authority of treaties and of preceding public Jurists, his own opinion that the transportation to the enemy of contraband articles alone is prohibited; but that the sale of such articles within the territory of the

neutral country is perfectly lawful; he admits that there may be instances where neutral nations, from a prudent desire of avoiding any collision with powerful belligerents, may have prohibited the trade in contraband of war within the territory; but he asserts that Venice was the only example, during the war of the American revolution, of a neutral state absolutely prohibiting such a traffic. Naples only prohibiting the building, for sale, of vessels of war, and the exportation of other contraband articles; whilst Tuscany permitted her subjects to continue their accustomed trade in such articles, both within the territory and for exportation: subject, in the latter case, to the belligerent right of seizing contraband goods going for the enemy's use."

made, is sold without any previous contract. But the general permission by international law to trade in contraband articles affords no reason for construing the 59 Geo. 3, c. 69, in the mode contended for. The preamble (*a*) expresses the mischief intended to be remedied. It speaks both of the "enlistment and engagement of his Majesty's subjects to serve in war," and of the fitting out, equipping, and arming of vessels "for warlike operations in or against the dominions or territories of any foreign prince," or "against the ships, goods, or merchandize of any foreign prince," as "prejudicial to" and tending "to endanger the peace and welfare of this kingdom." The 2nd section (*b*) prohibits enlistment in the service of any foreign prince, without his Majesty's licence, or on board any ship "intended to be used for any warlike purpose," of "any natural-born subject of the Crown." The latter part of that section also prohibits the hiring or procuring by any person, whether a natural-born subject or not, within the realm, of any other person, whether a natural-born subject or not, to act as an officer, soldier, or sailor in the land or sea service of any foreign prince, or to agree to go to or embark from any part of the dominions of the Crown of England in order to be so employed elsewhere. So that, as regards enlistment, it is plain that proximate acts of war, whether within the territory of this country, or which might tend to the violation of that territory, are not alone aimed at, but the prohibition is universal. Then what is the conclusion to be drawn from the Act itself, with reference to such extrinsic facts of history as are admissible to explain its object? The Act was passed, not because foreign powers had, by international law, a right to demand it, but because it was considered necessary to enable the Crown to take measures which might prevent entanglements with foreign powers, and pre-

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(*a*) *Ante*, p. 455, note.(*b*) *Ante*, p. 456, note.

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serve the peace of the kingdom. It is manifest that the enlistment of men and equipment of ships within the realm might involve the country in a war as to which it is neutral. If the subjects of a neutral state organize expeditions of men and equip ships of war against one of two belligerents, that state, without stopping to examine the rules as to "contraband," would probably declare war against the neutral state, rather than let it be carried on under the semblance of neutrality. But even if the matter stopped short of war, the peace and welfare of the kingdom might be endangered by a disturbance of friendly relations. The legislature has, therefore, included in the general category of "contraband" certain dealings not prohibited by international law, but which might result in danger to the peace and welfare of the kingdom. Suppose one belligerent possessed such naval power as to blockade all the ports of his adversary, so that not a single ship of war could come out; would it not be a just cause of complaint that, in the territory of a neutral state, where no attack could be made, arsenals should be established from which ships might be sent, either ready, or easily made ready, for sea, and converted into ships of war, and by which the blockade might be cleared, so that the naval superiority of the blockading power might be entirely destroyed by the assistance of the subjects of the neutral state? It is said that acts not prohibited by positive law may be done by an individual which, if done by the Government, would be a breach of international law; but that doctrine is not tenable. The question, "*Civitas ne deliqueret an cives*," which is part of the international law called "*Nobilissima questio juris gentium*," is discussed in Heineccius's Commentaries on Grotius, bk. 2, chap. 21, tit. de Poenarum Communicatione; and it is shewn that acts of the subject may implicate the state. The same doctrine is laid down in Burlamaqui's Principles of Politic Law,

p. 255 (a); by Sir William Scott, in the House of Commons: Hansard's Parliamentary Debates, vol. 40, p. 40 (b); and by *Marshall*, C. J., in his Life of Washington, vol. 5, p. 488 (c).

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(a) The following passage was cited:—"We may here further observe that in civil society, when a particular member has done an injury to a stranger, the Governor of the commonwealth is sometimes responsible for it, so that war may be declared against him on that account. But to ground this kind of imputation we must necessarily suppose one of these two things—sufferance or reception: viz., either that the Sovereign has suffered this harm to be done to the stranger, or that he has afforded a retreat to the criminal. In the first case it must be laid down as a maxim, that a Sovereign who, knowing the crimes of his subjects, as, for example, that they practice piracy on strangers, and being also able and obliged to hinder it, does not hinder it, renders himself criminal, because he has consented to a bad action, the commission of which he has permitted, and consequently furnished a just reason of war."

(b) The following passage was cited:—"There could be no solecism more injurious in itself or more mischievous in its consequences, than to argue that the subjects of a state had a right to act amicably or hostilely with reference to other countries without any interposition of the state itself. It was hardly necessary for him to press these considerations, because all the arguments which he had heard on the subject had fully admitted that it was the right

of states, and of states only, to determine whether they would continue neutral, or assume a belligerent attitude; that they had the power of preventing their subjects from becoming belligerent if they pleased to exert it." The following passage, in the speech of a member not named, was quoted as part of the argument of counsel:—"When ships were employed in the service of any power whatsoever without a licence from the British Government, such an enactment as this was required by every principle of justice; for, when the state says, 'We will have nothing to do with the war waged between two separate powers,' and the subjects in opposition to that say, 'We will, however, interfere in it,' surely the House would see the necessity of enacting some penal statute to prevent them from doing so, unless, indeed, it was to be contended that the state and the subjects who composed that state might take distinct and opposite sides in the quarrel."

(c) The following passage was cited:—"It being confessedly contrary to the duty of the United States, as a neutral nation, to suffer privateers to be fitted in their ports to annoy the British trade, it seemed to follow that it would comport with their duty to remedy the injury which may have been sustained, when it is in their power so to do. That the fact had been committed before the Go-

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In Duer on Marine Insurance, vol. 1, p. 750 (a), there is a discussion as to whether the language of Chancellor

vernment could provide against it might be an excuse, but not a justification. Every Government is responsible for the conduct of all parts of the community over which it presides, and is supposed to possess at all times the means of preventing infractions of its duty to foreign nations."

(a) The following passage was cited :—"It has been alleged, that the conduct of a neutral, who engages in a trade that by the law of nations subjects his property to capture and confiscation, is not illegal; that he has a perfect and lawful right to engage in the trade, and the belligerent, a right equally perfect and lawful, to seize and confiscate the property so employed. But the grounds on which this allegation is made are not easy to be discerned. It is, indeed, supported to some extent by the vague language of Vattel; but the observations of this not very accurate or profound writer will be found, when examined, to be inconsistent and self-contradictory. While he affirms that a neutral merchant may lawfully prosecute a trade with the belligerent country in articles contraband of war, he admits that a nation at war, from a regard to its own welfare and safety, has an absolute right to seize and confiscate all supplies of this nature destined to the use of its enemies; yet he overlooks the inevitable consequence, that if these proceedings of the belligerent

are necessary measures of self-defence, the conduct of the neutral in furnishing the warlike supplies is, in its nature, an act of positive, though indirect hostility; that it is, therefore, a plain violation of neutral duty, and that it is the illegality of the trade, as involving this offence, that can alone justify the penalty by which it is sought to be restrained. Were the trade lawful, although the belligerent might be allowed, from a regard to his own safety, to intercept warlike supplies destined to the use of his enemy, he would be bound to pay their value and satisfy their freight, for thus the injury to himself would be prevented, and the rights of the neutral be preserved. In confiscating the goods and the freight and in some cases the ship, the belligerent treats the neutral owners as enemies; and, unless on principle he has the right to consider them as such, their own Government would be bound to listen to their complaints, and redress their wrongs. Unless they are rightfully treated as enemies, the condemnation of their property, instead of being lawful, would be an act of violence and a cause of war. I am not aware that the observations of Vattel are sustained by any other writer on public law; and a single remark of Sir William Scott, that has already been given, contains in itself a full reply. It is found in his observation that *there are no conflicting rights between nations at peace*; and

Kent (a) is accurate when he speaks of two "conflicting rights" — the right of the neutral to carry contraband of war, and the right of the belligerent to intercept and capture it. But he merely meant that the law of nations does not impose upon a neutral state the obligation of preventing its merchants from carrying contraband of war; and the law of nations at the same time justifies the belligerent, as regards the neutral, in treating it as hostile. But a neutral state would never have submitted to the capture of the vessels of its subjects, and the rule of international law which authorizes that capture would never have prevailed, if the carriage of contraband to the ports of a belligerent was perfectly lawful. It is lawful in this sense, that there is no power to enforce the law which prohibits it, except the right of the belligerent to seize. But in a country which is professedly neutral, and where the Crown imposes on its subjects the duty of neutrality, it is *contra bonos mores* that they should deal in contraband of war. Bynkershoek, *Quæst. Jur. Pub. lib. 1, chap. ix.* (b) states that such trade is prohibited by international law, because those who

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this observation, although applied by him to the single case of a resistance to search, may be applied, with equal truth, to every case of a violation of neutral duty."

(a) 1 Kent Com. marg., p. 142.

(b) "Quidni igitur amici nostri ad amicos suos, quamvis nostros hostes, ea adferunt quæ ante adtulerunt; arma, viros, reliqua? . . . Horum officium est, omni modo cavere, ne se bello interponant, et his quam illis partibus sint vel æquiores vel iniquiores. . . . Et sane id quod modo dicebam non tantum ratio docet, sed et usus inter omnes fere gentes receptus. Quamvis enim libera sint cum amicorum nostrorum

hostibus commercia, usu tamen placuit (ut capite proximo latius ostendam) ne alterutrum, his rebus juvemus, quibus bellum contra amicos nostros instruatur et foveatur. Non licet igitur alterutri advehere ea, quibus in bello gerendo opus habet; ut sunt tormenta, arma, et, quorum præcipuus in bello usus, milites, quin et milites variis Gentibus pactis excepti sunt, excepta quandoque et navium materia, si quam maxime ea indigeat ad extruendas naves, quibus contra amicos nostros uteretur. Excepta sæpe et cibaria quando ab amicis nostris obsidione premuntur hostes, aut alias fame laborant. Optimo jure

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engage in it seem in a manner to make war upon a nation with whom there have been friendly relations. The law of this country has recognised that principle, and treated the trade in "contraband" as contra bonos mores, because it is an offence against international law, although it is not an offence punishable under the criminal law: *De Wutz v. Hendricks* (a), *Harratt v. Wise* (b), *Naylor v. Taylor* (c), *Medeiros v. Hill* (d). The language of Lord Stowell, in *The Imina* (e) and in *The Richmond* (f), is opposed to the view that a neutral sending contraband of war or breaking a blockade commits no offence against international law. The second principle of international law, as stated, viz., that the territory of a neutral power must be kept inviolate from proximate acts of war, is too narrow. It should be that the neutral territory should not be the basis of hostile operation. Her Majesty, by her proclamation (g), has

interdictum est, ne quid eorum hostibus subministremus; quia his rebus nos ipsi quodammodo videremur amicis nostris bellum facere."

(a) 2 Bing. 314.

(b) 9 B. & C. 712.

(c) 9 B. & C. 718.

(d) 8 Bing. 231.

(e) 3 C. Rob. 168.

(f) 5 C. Rob. 381.

(g) The following passage was cited:—"And we do hereby further warn all our loving subjects, and all persons whatsoever entitled to our protection, that if any of them shall presume, in contempt of this our royal proclamation, and of our high displeasure, to do any acts in derogation of their duty as subjects of a neutral Sovereign, in the said contest, or in violation or contravention of the law of nations in that behalf,

as for example, and more especially by entering into the military service of either of the said contending parties, as commissioned or non-commissioned officers or soldiers; or by serving as officers, sailors, or marines on board any ship or vessel of war or transport, of or in the service of either of the said contending parties, or by serving as officers, sailors, or marines on board any privateer bearing letters of marque of or from either of the said contending parties; or by engaging to go or going to any place beyond the seas, with intent to enlist or engage in any such service, or by procuring or attempting to procure within her Majesty's dominions, at home or abroad, others to do so; or by fitting out, arming, or equipping any ship or vessel to be employed as a ship of war,

warned all her subjects, under penalties, to abstain from unneutral acts. The Customs Consolidation Act, 16 & 17 Vict. c. 107, s. 150(a), empowers the Queen to prohibit every species of "contraband" but ships, which are left to be dealt with under the Foreign Enlistment Act. The judgment of Lord *Stowell* in the case of *The Richmond* (b) and *The Flad Oyen* (c), afford ground for believing that

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or privateer, or transport by either of the said contending parties; or by breaking or endeavouring to break any blockade lawfully and actually established by or on behalf of either of the said contending parties; or by carrying officers, soldiers, despatches, arms, military stores or materials, or any article or articles considered and deemed to be contraband of war, according to the law or modern usage of nations for the use or service of either of the said contending parties; all persons so offending will incur and be liable to the several penalties and penal consequences by the said statute or by the law of nations in that behalf imposed or denounced."

(a) Sect. 150. "The following goods may, by proclamation or order in council, be prohibited either to be exported or carried coastwise: arms, ammunition, and gunpowder, military and naval stores, and any articles which her Majesty shall judge capable of being converted into or made useful in increasing the quantity of military or naval stores, provisions, or any sort of victual which may be used as food by man, and if any goods so prohibited shall be exported from the United Kingdom or carried

coastwise, or be waterborne to be so exported or carried, they shall be forfeited."

(b) 5 C. Rob. 329, 331. The following passage was cited:—"It appears that the vessel was originally built for a ship of war, and was easily convertible to warlike purposes, and it is established in evidence that the master conversed with several persons on this subject, and disclosed an intention of selling her at the Isle of France. . . Here was an avowed intention of going to sell a ship to a belligerent, which in time of war is at least a very suspicious act—and to do a great deal more, to sell a ship which the neutral owner knew to be peculiarly adapted for purposes of war, and with a declared expectation that it would be hostilely employed against this country. It cannot surely, under any point of view, but be considered as a very hostile act to be carrying a supply of a most powerful instrument of mischief, of contraband ready made up, to the enemy for hostile use, and intended for that use by the seller, and with an avowed knowledge that it would be so applied."

(c) 1 C. Rob. 144. The following passage was cited:—"Mark

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the legislature never intended to leave the trade in ships more free than the trade in other contraband. There is an obvious difference between furnishing a ship of war and ordinary contraband of war. A person who carries contraband to a belligerent is engaged in a mere commercial adventure. It does not become a warlike operation until the contraband, having escaped the risk of capture, is delivered in the belligerent country. But a ship is not only an engine of war, but carries engines of war, and men to work those engines. A ship has a nationality, and is for some purposes an inhabited territory. So that a ship armed, equipped, and manned, is in fact a floating hostile territory; and the elements of armament are combined in her whether she is on the high seas or in the neutral country. This distinction between ships, and arms, and ammunitions, is illustrated by the correspondence (a) between Mr. Jefferson

the consequences which must follow from such a pretended concession" (a concession by the neutral power to a belligerent of the right to hold a prize court within its limits), "observe in the present case how it would affect the neutral character of the ports in the North! If France can station a judge of the admiralty at Bergen, and can station there its cruisers to carry in prizes for that judge to condemn; who can deny that, to every purpose of hostile mischief against the commerce of England, Bergen will differ from Dunkirk in no other respect than this, that it is a port of the enemy to a much greater extent of practical mischief. To make the ports of Norway the seats of the French tribunals of war, is to make the

adjacent sea the theatre of French hostilities. It gives one belligerent the unfair advantage of a new station of war, which does not properly belong to him; and it gives to the other the unfair disadvantage of an active enemy in a quarter where no enemy would naturally be found."

(a) 3 Jefferson's Works, 558. The following passages in Mr. Jefferson's answer to Memorials of the British Government were cited:—"The purchase of arms and military accoutrements by an agent of the French government, in this country, with an intent to export them to France, is the subject of another of the memorials. Our citizens have been always free to make, vend, and export arms. It is the constant occupation and livelihood

and Mr. Hammond, the British Minister, in 1793, before the Foreign Enlistment Act or the American Act passed, and the correspondence between Mr. Jefferson and M. Genet, the Minister Plenipotentiary of the French Republic (a). Moreover, the person who deals in contraband trades with his own goods for his own profit; but if a belligerent state by its agent orders ships of war to be built and equipped in a neutral state, there is no object of a commercial kind; but it is purely a warlike operation. If that may be done in a single case, fleets might be provided by neutral states, and through their intervention the naval superiority of either of the belligerents destroyed. It is said that when the territorial right of the neutral ceases the right of the belligerent begins, and consequently, in order to exercise the right of capture, the ships of the belligerents may advance to the limit of the boundary line, to watch for ships coming from the neutral port. It was further suggested that a belligerent ship, instead of waiting outside, might come within the line

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of some of them. To suppress those callings, the only means, perhaps, of their subsistence, because a war exists in foreign and distant countries, in which we have no concern, would scarcely be expected. It would be hard in principle and impossible in practice. The law of nations therefore, respecting the rights of those at peace, does not require from them such an internal derangement in their occupations. It is satisfied with the external penalty pronounced in the President's proclamation, that of confiscation of such portion of these arms as shall fall into the hands of any of the belligerent powers on their way to the ports of their enemies. To this penalty our

citizens are warned that they will be abandoned."

(a) 3 Jefferson's Works, 571. The following passages were cited:—"In a conversation which I had afterwards the honor of holding with you, I observed that one of those armed vessels, the 'Citizen Genet,' had come into this port with a prize; that the President had thereupon taken the case into further consideration, and after mature consultation and deliberation, was of opinion that the arming and equipping vessels in the ports of the United States to cruise against nations with whom they were at peace, was incompatible with the territorial sovereignty of the United States; that it made them instrumental

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and accompany the other ship on its departure from the neutral port, and attack it the moment they were beyond the line. But would not that, according to the narrowest construction of the statute, "be prejudicial to and tend to endanger the peace and welfare of this kingdom?" There would be endless questions of causeless captures, because the capture would take place before the armament was completed, and it would be asserted that the ship was an innocent merchantman, and not intended for warlike purposes. Again, the question would arise as to which side of the boundary line the attack, or the prosecution of it, had taken place. If the armament of a ship beyond the boundary line would take the case out of the Act, it might easily be infringed, and its object rendered nugatory. A foreign government having cause of complaint that the ports of this country were made arsenals for its enemies, would not inquire whether the armament took place within or without the boundary line. If the building of the ship and the equipment takes place within it, the armament is part of the same transaction: *The Twee Gebroeders* (a). The judgment of Lord Stowell in *The William* (b), where the

to the annoyance of those nations, and thereby tended to compromise their peace; and that he thought it necessary, as an evidence of good faith to them, as well as a public reparation to the sovereignty of the country, that the armed vessels of this description should depart from the ports of the United States."

(a) 3 C. Rob. 162.

(b) 5 C. Rob. 395. The following passages were cited:—"Neither will it be contended that the point from which the commencement of a voyage is to be reckoned changes as often as the ship stops in the

course of it; nor will it the more change because a party may choose arbitrarily by the ship's papers, or otherwise, to give the name of a distinct voyage to each stage of a ship's progress. The act of shifting the cargo from the ship to the shore, and from the shore back again into the ship, does not necessarily amount to the termination of one voyage and the commencement of another. It may be wholly unconnected with any purpose of importation into the place where it is done. Supposing the landing to be merely for the purpose of airing or drying

destination of a ship was attempted to be disguised, is applicable in principle to this case. The case of *The Washington* (a), *Gibson v. Service* (b), *Stewart v. Gibson* (c), and *The Gran Para* (d), are also authorities that the building, equipment, and armament of a ship is not the less illegal because it has only originated in this country and been completed beyond the boundary line.

The statute should be construed according to the well

the goods, or of repairing the ship, would any man think of describing the voyage as beginning at the place where it happened to become necessary to go through such a process? Again, let it be supposed that the party has a motive for desiring to make the voyage appear to begin at some other place than that of the original lading; and that he therefore lands the cargo purely and solely for the purpose of enabling himself to affirm, that it was at such other place that the goods were taken on board, would this contrivance at all alter the truth of the fact? Would not the real voyage still be from the place of the original shipment, notwithstanding the attempt to give it the appearance of having begun from a different place? The truth may not always be discernible; but when it is discovered, it is according to the truth, and not according to the fiction, that we are to give to the transaction its character and denomination. If the voyage from the place of lading be not really ended, it matters not by what acts the party may have evinced his desire of making it appear to have been ended. That those

acts have been attended with trouble and expense cannot alter their quality or their effect. The trouble and expense may weigh as circumstances of evidence, to shew the purpose for which the acts were done; but if the evasive purpose be admitted or proved, we can never be bound to accept, as a substitute for the observance of the law, the means, however operose, which have been employed to cover a breach of it."

(a) 2 Acton, 30, note.

(b) 5 Taunt. 433.

(c) 1 Rob. Scotch Ap. 260.

(d) 7 Wheaton's Amer. Rep. 478. The following passage was cited:—"She was not commissioned as a privateer, nor did she attempt to act as one until she reached the river La Plata, when a commission was obtained, and the crew re-enlisted. This Court has never decided that the offence adheres to the vessel whatever changes may have taken place, and cannot be deposited at the termination of the cruise in preparing for which it was committed; and as the 'Irresistible' made no prize on her passage from Baltimore to the river La Plata, it is contended that her offence was deposited there, and

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known rules stated in Plow. 205 *a*, *Heydon's Case* (*a*), by *Tindal*, C. J., in the *Sussex Peerage* (*b*), and in Bacon's Abridg. tit. Statute (I.) 5. The rule as to the construction of penal statutes is stated by *Marshall*, C. J., in *The United States v. Wiltberge* (*c*). [*Brammoell*, B., referred to Sedgwick on Statutory and Constitutional Law, p. 326.] A judicial interpretation has been put on the enlistment clauses of the American Act, in the case of *The United States v. Workman* (*d*). The construction of an act of parliament cannot be narrowed by any declarations or

that the Court cannot connect her subsequent cruize with the transactions of Baltimore. If this were to be admitted in such a case as this, the laws for the preservation of our neutrality would be completely eluded, so far as their enforcement depends on the restitution of prizes made in violation of them; vessels completely fitted in our ports for military operations need only sail to a belligerent port, and there, after obtaining a commission, go through the ceremony of discharging and re-enlisting their crew to become perfectly legitimate cruizers, purified from every taint contracted at the place where all their real force and capacity for annoyance was acquired. This would indeed be a fraudulent neutrality, disgraceful to our own Government, and of which no nation would be the dupe."

(*a*) 3 Rep. 7.

(*b*) 11 Cl. & F. 145.

(*c*) 5 Wheaton's Amer. Rep. 95.

The following passage was cited:—"The rule that penal laws are to be construed strictly is, perhaps, not much less old than con-

struction itself. It is founded on the tenderness of the law for the rights of individuals, and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment. It is said that, notwithstanding this rule, the intention of the lawmaker must govern in the construction of penal, as well as other statutes. This is true. But this is not a new independent rule which subverts the old. It is a modification of the ancient maxim, and amounts to this, that though penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature. The maxim is not to be so applied as to narrow the words of the statute to the exclusion of cases which those words, in their ordinary acceptance, or in that sense in which the legislature has obviously used them, would comprehend."

(*d*) Wharton's American Criminal Law, 905, 3rd ed. The

speeches of ministers or members of parliament at the time of its introduction, or by inferences drawn from transactions of state, which are no part of the legislation. The history of the rules of Washington, which have been referred to, will be found in Wheaton's *Law of Nations*, 712, 2d ed. (a), where it is laid down, that consistently with international law, a neutral state may permit belligerents to make warlike equipments, or do any other act forbidden by the Foreign Enlistment Act, without any breach of neutrality, provided it is equally and impartially permitted to both parties. But the United States had a treaty with France, which guaranteed that country against privateers being armed in American

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following passage was cited:—
“First of all it is an undeniable proposition that all penal statutes are to receive a strict construction. This is a penal statute, and it falls within this rule. The terms used are not to be extended beyond their natural import to fix an offence on the defendants; but this rule, on the other hand, does not require any such construction as to fritter it away and defeat its object, and annul the law itself. I will then state to you in the outset some of these essential rules, and point out their application. We are to look at the spirit, intent, and object of a law; what mischief it was intended to prevent, and in what manner the remedy is to be applied. What, then, is this law? Its great object, the all pervading object of this law, is peace with all nations; national amity, which will alone enable us to enjoy friendly intercourse and uninterrupted commerce, the great source

of wealth and prosperity; in short, to prevent war, with all its sad and desolating consequences. These being the objects of this law, they are sufficiently important to arrest the attention of both Court and jury, and secure to the United States and to the accused a fair and impartial trial. Before the jury can convict on this indictment, it must be proved to their satisfaction that the expedition or enterprise was in its character military; or, in other words, it must have been shewn by competent proof that the design, the end, the aim, and the purpose of the expedition or enterprise was some military service, some attack or invasion of another people or country, state, or colony, as a military force.”

(a) He also referred to Gibb's Foreign Enlistment Act, London, 1863, which *Pollock*, C. B., said was very useful, as collecting all the authorities in convenient form.

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ports and French prizes being brought into those ports, so that the United States could not, without a breach of neutrality, allow France to equip ships of war, because the treaty prevented them from allowing England to do the same. The rules (a) did not, nor were they intended to express absolute obligation imposed by international law upon neutral states, but were founded on this principle of international law, that a neutral state has a right to prohibit a belligerent from carrying on warlike operations within its territory, and that it would fail in its duty of neutrality if it did not either prohibit it or allow the other belligerent to do the same. The rules which were promulgated on the 3rd August, 1793, are headed (a): "Rules adopted by the American Cabinet as to the equipment of vessels in the ports of the United States by belligerent powers, and proceedings on the conduct of the French Minister." They were, therefore, an Act of State, and their sole connection with international law was, that they were warranted by the principles of that law. It is a principle of international law, that, if neutrality is professed, it must be an impartial neutrality, unless, indeed, there is some antecedent engagement with one party not made in contemplation of the particular hostilities. Subject to that exception, it is the duty of neutrals to be impartial, and of belligerents not to violate the neutral territory: Kent's Com. vol. 1, marg., p. 116. 117. On the 5th June, 1793, the government of the United States gave notice that they would no longer permit prizes taken by French vessels equipped for war to be brought into American ports. The matter is distinctly explained in a letter from Mr. Jefferson, the American minister, to Mr. Hammond, the British minister, dated the 5th September, 1793, which is annexed to the treaty between Great Britain and the United States, of the years 1794, 1795: 4 Jefferson's

(a) *Ante*, p. 446, note.

Works, 56; Martens, *Recueil des Traités*, tom. 5, p. 690 (a). The French agents supposed that the treaty gave them not only a negative but a positive right to equip and arm vessels within the ports of the United States, and they continued to do so after the notice. Under these circumstances the rules were promulgated, which had a foundation in the law of nations: Kent's Com. vol. 1, marg. p. 122. The rules make a distinction between equipments *ancipitus usus*, and those essentially warlike; and because in that political act, and in the absence of legislation, it was thought expedient to make the distinction, it is now sought to import it into the interpretation of subsequent legislation. It might as well be said that everything which the rules promulgated by the British government (b) permits is a principle of international law which must regulate the interpretation of subsequent legislation. The President's speech to the two Houses of Congress on


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(a) The following passage was cited:—"We are bound by our treaties with three of the belligerent nations *by all the means in our power* to protect and defend their vessels and effects in our ports or waters, or on the seas near our shores, and to recover and restore the same to the right owners when taken from them. If all the means in our power are used, and fail in their effect, we are not bound by our treaties with those nations to make compensation. Though we have no similar treaty with Great Britain, it was the opinion of the President that we should use towards that nation the same rule which, under this article, was to govern us with the other nations, and even extend it to captures made

on *the high seas*, and brought into our ports, if done by vessels which had been armed within them. Having, for particular reasons, forbore to use *all the means in our power* for the restitution of the three vessels mentioned in my letter of August the 7th, the President thought it incumbent on the United States to make compensation for them; and though nothing was said in that letter of other vessels taken under like circumstances, and brought in after the 5th of June, and *before the date of that letter*, yet, where the same forbearance had taken place, it was and is our opinion that compensation should be equally due."

(b) Wheaton on International Law, 717, 2nd ed.

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the 3rd December, 1793, when announcing the rules of the American government, does not warrant the conclusion that the American Act was passed simply for the purpose of enacting as law the provisions of those rules: Sparks' Writings of Washington, vol. 12, p. 36 (a). The judgment of *Bushrod Washington*, J., in the case of *The Alerta* (b), and the judg-

(a) The following passages were cited:—"As soon as the war in Europe had embraced those powers with whom the United States have the most extensive relations, there was reason to apprehend that our intercourse with them might be interrupted, and our disposition for peace drawn into question by the suspicions too often entertained by belligerent nations. It seemed, therefore, to be my duty to admonish our citizens of the consequences of a contraband trade, and of hostile acts to any of the parties; and to obtain by a declaration of the existing legal state of things an easier admission of our right to the immunities belonging to our situation. Under these impressions the proclamation which will be laid before you was issued.

In this posture of affairs, both new and delicate, I resolved to adopt general rules which should conform to the treaties, and assert the privileges of the United States. These are reduced into a system, which will be communicated to you. Although I have not thought myself at liberty to forbid the sale of the prizes permitted by our treaty of commerce with France to be brought into

our ports, I have not refused to cause them to be restored when they were taken within the protection of our territory, or by vessels commissioned or equipped in a warlike form within the limits of the United States.

It rests with the wisdom of Congress to correct, improve, or enforce this plan of procedure; and it will probably be found expedient to extend the legal code and the jurisdiction of the Courts of the United States to many cases, which, though dependent on principles already recognised, demand some further provisions."

(b) 9 Cranch, Amer. Rep. 359. The following passage was cited:—"A neutral nation may, if so disposed, without a breach of her neutral character, grant permission to both belligerents to equip their vessels of war within her territory. But without such permission the subjects of such belligerent powers have no right to equip vessels of war or to increase or augment their force, either with arms or with men, within the territory of such neutral nation. Such unauthorised acts violate her sovereignty and her rights as a neutral."

ment of *Livingstone, J.*, in the case of *The Estrella* (a), shew that the American Act was not intended simply to enable the government of the United States to enforce against its subjects obligations due to belligerent states. The doctrine laid down in Wheaton on International Law, p. 727 note, 2nd ed. (b), also applies to this subject. With respect to the expression, "a station of hostilities," there is no authority for the proposition that taking a ship out

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(a) 4 Wheaton, Amer. Rep. 298. The following passages were cited :—"So long as a nation does not interfere in the war, but professes an exact impartiality towards both parties, it is its duty as well as right, and its safety, good faith, and honour demand it, to be vigilant in preventing its neutrality from being abused for the purposes of hostility against either of them. This may be done, not only by guarding in the first instance as far as it can against all warlike preparations and equipments in its own waters, but also by restoring to the original owner such property as has been wrested from him by vessels which have been thus illegally fitted out. In the performance of this duty, all the belligerents must be supposed to have an equal interest, and a disregard or neglect of it would inevitably expose a neutral nation to the charge of insincerity, and to the just dissatisfaction and complaints of the belligerent, the property of whose subjects should not, under such circumstances, be restored. The United States, instead of opening their ports to all the contending parties when at peace themselves, (as may be

done if not prevented by antecedent treaties,) have always thought it the wisest and safest course to interdict them all from fitting out or furnishing vessels of war within their limits, and to punish those who may contribute to such equipments."

(b) "It is a settled principle of the law of nations that no belligerent can rightfully make use of the territory of a neutral state for belligerent purposes without the consent of the neutral Government. The undertaking of a belligerent to enlist troops of land or sea in a neutral state without the previous consent of the latter is a hostile attack on its national sovereignty. A neutral state may, if it please, permit or grant to belligerents the liberty to raise troops of land or sea within its territory; but for the neutral state to allow or concede the liberty to one belligerent, and not to all, would be an act of manifest belligerent partiality, and a palpable breach of neutrality. The United States constantly refuse this liberty to all belligerents alike, applying with impartial justice; and that prohibition is made known to the world by a permanent Act of Congress."

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of a neutral port with the means of carrying on war, is an act of hostility or a proximate act of war. It is, no doubt, an act tending in its result to injure the neutral state; so is the act of sending out a ship not armed for war, but ready to receive her arms.

Then, with respect to the 59 Geo. 3, c. 69 (*a*). The intention of that Act was not to enforce existing international law, but to enable the Crown to maintain its neutrality: Canning's Speeches, vol. 4, p. 151 (*b*). On the face of the preamble (*c*) the protection of the "peace and welfare of the kingdom" is the sole object; and there is no indication of an intention to limit its provisions by the precise extent of any obligations of this kingdom to foreign belligerents. It is argued that the enlistment clauses were merely intended to compel subjects to render due allegiance to the Crown, and are not connected with neutrality or international obligation. But the enlistment and engagement of subjects to serve in war in foreign service, and the fitting out, equipping and arming of vessels are coupled together. Neither the preamble nor the body of the Act speaks of equipping, fitting out and arming in any particular manner, but for a particular purpose, "warlike operations." If the object is warlike operations, the equippers may produce the mischief sought to be redressed. The preamble (*c*) also recites that "the laws in force are not sufficiently effectual for preventing the same." Therefore, it was obviously intended to make a law which should be sufficient to *prevent* the mischief, not for the purpose of punishment. It is only necessary to

(*a*) *Antè*, p. 455, note.

(*b*) The following passage was cited:—"The House had to determine, first, if the existing laws of the country would enable her to maintain her neutrality; secondly, if the repeal of those laws

would leave the power of maintaining that neutrality; and, thirdly, if both the former questions were negatived, whether the proposed measure was one which it was fit to adopt."


(*c*) *Antè*, p. 455, note.

advert to eight clauses of the Act, five of which relate to enlistment. Any principle of interpretation derived from international obligations is utterly inapplicable to these clauses. It could never be contended that what is prohibited by the first branch of the second clause (*a*) might, before the Act passed, have been treated as a breach of international obligation by a neutral towards a belligerent state, for the prohibition is universal, and extends to every natural-born subject wheresoever the enlistment may take place, even in the territory of a foreign nation. The latter part of the clause goes further, and includes the case of a foreigner within this realm procuring or attempting to procure another foreigner, not only to enlist, but "to go, or agree to go, or embark from any part of his Majesty's dominions for the purpose or with intent to be so enlisted." That clause has a wider scope than the 2nd section (*b*) of the American Act, which contains an exception with respect to persons "transiently within the United States." The 7th section (*c*) of the 59 Geo. 3, c. 69, materially differs from the 3rd section (*d*) of the American Act. In the former the disjunctive is used instead of the conjunctive, and the word "equip" is not used in any of those portions of the 3rd section of the American Act which define and describe the offence, but only incidentally and for a different purpose; whereas in the 7th section of the English Act the word "equip" is used throughout. The word "furnish" is used throughout the 7th section of the English Act, but in the American Act it is not used in describing the principal offence, but only the offence in the second degree. In the American Act the purpose is expressed solely by the words "to the intent that"; but the words "or in order" have been introduced into the English Act. Then there is in the

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(*a*) *Antè*, p. 456, note.(*c*) *Antè*, p. 458, note.(*b*) *Antè*, p. 448, note.(*d*) *Antè*, p. 449, note.

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English Act an interpolation of the words, "as a transport or store ship, or with intent." The American Act declares that the ship, with her tackle, &c., "together with all materials, arms, ammunition, and stores, which may have been procured for the building and equipping thereof, shall be forfeited;" but in the English Act, instead of the words "may have been procured for the *building* and equipping thereof," the words are "may belong to or be on board any such ship or vessel." The American Act shews that the term "fit out" is used as applicable to a vessel in the course of building, for it declares that "the materials used for the building thereof" shall be forfeited. The omission of the word "building" in the English Act does not affect the case, because, in point of law, the materials for building are no part of the ship until appropriated to her, so as to vest them in the owner of the hull, and if appropriated they come within the words "materials which may belong to or be on board such ship or vessel." The 8th section (a) of the 56 Geo. 3, c. 69 also differs from the corresponding section of the American Act. The 5th section (b) of that Act prohibits the augmentation of a ship of war by adding to the number of the guns of such vessel, or by changing those on board of her for guns of a larger calibre; in the 8th section of the English Act the words are "by adding to the number of the guns of such vessel, or by changing those on board for other guns;" not limiting it to an examination whether the guns are of a larger calibre. Then the American Act goes on to say, "or by the addition thereto of any equipment solely applicable to war." The English Act uses the words, "or by the addition of any equipment for war," thereby avoiding any dispute as to whether the equipment is "solely applicable to war." The 10th section (c) of the

(a) *Antè*, p. 461, note.

(b) *Antè*, p. 450, note.

(c) *Antè*, p. 451, note.

American Act deals with a particular class of ships, viz., armed vessels belonging wholly or in part to citizens of the United States; and there is no corresponding provision in the English Act. The 11th section (a) of the American Act authorizes the collectors of customs to detain any vessel manifestly built for warlike purposes, so that a vessel not furnished with equipments exclusively applicable to war, provided she is manifestly built for warlike purposes, is within the purview of the Act. There is no corresponding provision in the English Act. However, the ultimate question is, what is the meaning of the language of the 7th section (b) of the 59 Geo. 3, c. 69, without reference to any other statute, or decision upon a statute in *pari materia*. The words "equip, furnish, and fit out" do not mean the same thing. The word "equip" includes whatever is done for the purpose of preparing a ship for the service she has to perform. It includes that which is not included in the words "fit out," namely, the crew, who in the French language are called "équipage." In Todd's Johnson's Dictionary "equip" is thus defined:—"It is properly a naval term, *équipé* being the old French for a sailor, and so used in the 13th century, derived perhaps from the barbarous Latin *eschipare*, to furnish or adorn vessels; whence *echipper* or *equipper*, as Junius has observed, was easily formed. See also Du Cange in v. *Eschipare*. And thus our own word was also at first written *esquippe*, and used in the naval sense, as by Barret in 1580, "to equippe or furnish ships with all ablements." In the French Dictionary de l'Academie, there is a similar definition of equipment. In Miltiza, Manuel des Consuls, vol. 1, p. 13, App., it is said: "Equipment, qui comprend aussi les gens de l'équipage et les vivres." Again, in vol. 2, p. 415, note 4, the author, drawing a distinction between "bagage" and "équipage,"

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describes the latter as “viaticus apparatus.” In Burn’s Naval and Military Technical Dictionary of the French Language “équipement” is thus defined: “Armament, manning, accoutrements, stores for a voyage;” and “équiper” is defined “to equip, fit out, arm, man, provide and furnish, provide with necessaries and stores, supply stock.” In Falconer’s Marine Dictionary “to equip” is defined: “a term frequently applied to the business of fitting a ship for sea, or arming her for war.” The term is used in the same sense by Lord *Stowell* in *The Charlotte* (a). Therefore the word “equipment” is not necessarily connected with military equipment, and unless the words “for warlike purposes” or “in a distinctively warlike manner” are imported in the Act after the word “equip,” it has a meaning consistent with the whole purview of the statute, which was intended to prevent the completion of a particular act. It has also been suggested (b) that the word “equip” is derived from the German or High Dutch “schip” or “schiff.” Fitting out and manning are treated as distinct in Abbott on Ship-

(a) 5 C. Rob. 305, 314. The following passage was cited:— “It is then said that the cargo was going to the public arsenal of the *enemy*. It was going to Cadiz, which is a place of great military equipment; but it is a place of great mercantile equipment also: and it does not appear, I think, exactly as it has been represented, that those articles were to be delivered to the public arsenal of the state. What has been said on the other side is, I think, true, that the nature of the port is not material, since masts, if they are to be considered as contraband, which they will be unless

protected by treaty, are so without reference to the nature of the port, and equally whether bound to a mercantile port only, or to a port of naval military equipment. The consequences of the supply may be nearly the same in either case. If sent to a mercantile port, they may be there applied to immediate use in the equipment of privateers, or they may be conveyed from Nantes to Brest, and there become subservient to every purpose to which they could have been applied if going directly to a port of military equipment.”

(b) Gibbs’ Foreign Enlistment Act. London, 1863.

ping, p. 134, 8th ed. It would seem from the judgment of Story, J. in *The Santissima Trinidad* (a), that he considered that an addition to the number of the crew was an "equipment" within the meaning of the American Act. "Equipment" also means "rigging:" *Frost v. Oliver* (b). So that the term has these two extreme meanings—"manning," which is most remote from "furnishing;" and "rigging," which belongs to the category of "furniture." Moreover, many things connected with the structure of a ship are comprehended in the term "equipment," such as the bulwarks. The treaty between Great Britain and the United States in the year 1794 affords an illustration of what may be included within the word "equipment." The 18th article of that treaty defines what shall in future be considered contraband of war, and after mentioning arms and implements of war, also timber for ship building, &c., it goes on to say, "and generally whatever may serve directly to the equipment of vessels, unwrought iron and *fir planks* only excepted." If the term "equipment" is to receive the limited construction contended for, it would be difficult to suggest any equipment exclusively applicable to a transport or storeship. The term "fit out" is nomen generalissimum, and comprehends every act from laying down the keel to the completion of the vessel fit for sea. If the whole is done for a particular purpose, every single part is only a step towards the completion of the design. Suppose a mere hull is seized, and there is indubitable evidence of an intention to complete and equip a ship to be employed in the service of a belligerent to cruise and commit hostilities, every attempt ab initio would be an offence against the Act: *Langton v. Hughes* (c). The words "or arm" require no

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(a) 7 Wheaton's Amer. Rep.
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(b) 2 E. & B. 301, 305.

(c) 1 M. & Sel. 593. 596.

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comment, but "if arming" alone was aimed at, why insert the words "furnish and fit out?" The "attempt or endeavour" can only apply to that which would have been completed if not stopped. Here the "Alexandra" was being fitted out in order that she might go to sea fully equipped, and that was only not done because the Government seized the vessel. Then as to "aiding, assisting, or being concerned in the equipping:" it is conceded that something must be done, or attempted to be done, which falls within the definition of the principal offence. But the words extend to an act done partly here and partly elsewhere. As to the word "furnishing:" while "fitting out" will include everything, and "equipment" will include "manning," "furnishing" will include the smallest article of furniture. It is sought to introduce into the general words of the 7th section (a) qualifications not authorized by the legislature. That section says, "shall equip, &c., or attempt, or aid with intent or in order that such ship or vessel shall be employed in the service of any foreign prince, &c., with intent to cruize or commit hostilities." Upon that two questions arise: first, what is the intent; secondly, what is to be done in pursuance of it? There must be a fixed and absolute intention on the part of some person who has control over the ship. In the case of *The Santissima Trinidad* (b) there was no definite intention on the part of the equipper so as to constitute the *mens rea*, for he merely armed and sent the vessel abroad on speculation. But there may be two descriptions of intent—the intent of the foreign belligerent or his agent to employ the ship to cruise and commit hostilities, and the intent of the person who equips her in order that she may be so employed. Probably the words "in order that" were introduced to

(a) *Antè*, p. 458, note.

(b) 7 Wheaton Amer. Rep. 283.

meet the latter case, because it might be said that the equipper could not intend that she should be so employed, because he has no control over her after he has delivered her up. If the belligerent or his agent *procures* the ship to be equipped, although the equipper does not know of his intention, the ship would be forfeited, for the object of the Act is to prevent any vessel leaving the ports of this country as the basis of hostilities. If the equipper equips the ship, knowing that she is to be so employed, that would also be within the Act, because he equips "with the intent," or in order that she may be so employed, or, at all events, knowingly aids and assists. Then what is to be done in pursuance of that intent? If the ship must be so far equipped as to be in a condition to commit hostilities when she leaves a port in this kingdom, she must be both armed and manned. But that construction would defeat the object of the legislature, who has intentionally used the disjunctive instead of the conjunctive. That construction is also opposed to the doctrine laid down in *The United States v. Quincy* (a). Then if the ship need not be in a condition to cruise or commit hostilities,

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(a) 6 Peter's Amer. Rep. 445. 465. The following passages were cited :—"To attempt to do an act does not, either in law or in common parlance, imply a completion of the act or any definite progress towards it. Any effort or endeavour to effect it will satisfy the terms of the law.

This varied phraseology in the law was probably employed with a view to embrace all persons of every description who might be engaged directly or indirectly in preparing vessels with intent that they should be employed in committing hostilities against any powers with whom the United States were at peace. Different degrees

of criminality will necessarily attach to persons thus engaged. Hence the great latitude given to the Courts in affixing the punishment, namely, a fine not more than 10,000 dollars and imprisonment not more than three years.

We are accordingly of opinion that it is not necessary that the jury should believe or find that the 'Bolivar,' when she left Baltimore, and when she arrived at St. Thomas, and during the voyage from Baltimore to St. Thomas, was armed or in a condition to commit hostilities, in order to find the defendant guilty of the offence charged in the indictment."

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how must she be equipped? It is said that the equipment must be, not *ancipitus usus*, but of a distinctively warlike character; but that would be introducing into the statute the words "as a ship of war." The words, "to cruize or commit hostilities," are applied to the employment of the ship, not as qualifications of the equipment: *The United States v. Quincy*. If there is proof of the intent to equip and fit out the ship for the purpose of being employed in the service of a foreign prince to cruize or commit hostilities, the whole case is proved. Suppose a merchant vessel was lengthened and fitted with new boilers in order to increase her speed, and the equipper admitted that it was done for the purpose of enabling her to capture other vessels, that would be an equipping with intent that she should be employed to cruize or commit hostilities, although it would be *ancipitus usus*. "Equipment" only means such equipment as is necessary to enable the ship to go to sea. It is the same with the words "fit out" and "furnish." There is nothing in the Act to indicate that the ship must be armed or in a condition to cruize or commit hostilities the moment she passes the boundary line. The mischief will not be suppressed if such limitations are introduced into the Act. The character of the structure, and the purpose for which the ship is built, may of itself determine the character of the equipment. The repetition of the words "with intent" does not alter the sense; for the words which follow must be words of qualification applicable to "transport or store ship," as well as to "cruize or commit hostilities;" otherwise there would be this absurdity, that furnishing a ship for the purpose of being used as a transport or store ship, though not for belligerent purposes, would be illegal. Moreover, in the subsequent part of the section relating to the delivery of a commission for any ship, the words are "to the intent

that such ship or vessel shall be employed as aforesaid," which must apply both to a "transport or store ship," and to "cruizing or committing hostilities." If the language of the 7th section be compared with the corresponding language of the 2nd (a), it will be found that, in the latter as in the former, the main purpose is the material thing. The 2nd section (a) has reference to a person enlisting to serve as a sailor "in and on board any ship or vessel of war, or in and on board any ship used, or fitted out, or equipped, or intended to be used for any warlike purpose." The words "intended to be used," which are separated by the disjunctive from "fitted out," and "equipped," correspond with the words in the 7th section (b), "with the intent that such ship or vessel shall be employed." It is said that "equip" is *ancipitus usus*, but that expression implies that it may be either of an innocent or a warlike character. A definition of "*ancipitus usus*" is given by Lord *Stowell* in *The Jonge Margaretha* (c). The legislature was aware that ships which had not a distinctive warlike equipment might never-

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(a) *Antè*, p. 456, note.

(b) *Antè*, p. 458, note.

(c) 1 C. Rob. 189, 194. The following passage was cited:—"But the most important distinction is, whether the articles were intended for the ordinary use of life, or even for mercantile ships' use, or whether they were going with a highly probable destination to military use. Of the matter of fact on which the distinction is to be applied, the nature and quality of the port to which the articles were going is not an irrational test; if the port is a general commercial port, it shall be understood that the articles were going for civil use, although

occasionally a frigate or other ships of war may be constructed in that port. On the contrary, if the great predominant character of a port be that of a port of naval military equipment, it shall be intended that the articles were going for military use, although merchant ships resort to the same place, and although it is possible that the articles might have been applied to civil consumption; for it being impossible to ascertain the final use of an article *ancipitis usus*, it is not an injurious rule which deduces both ways the final use from the immediate destination."



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theless be employed for a warlike purpose, and that the object they attempted to defeat might be accomplished if such an evasion was allowed. Where the purpose and intent of the employment of the ship is proved, that determines the character of the equipment, fitting out and furnishing: *The Richmond* (a), *The Brutus* (b); and the distinctive warlike character of the equipment may of itself determine the purpose. Assuming that the equipment is applicable either to a merchant ship or a vessel of war, regard must be had to its destination, and quo animo et intentû it was equipped. An argument is founded on the absence of the word "build," but it is dangerous to narrow the interpretation of an act of parliament because a particular word, which might have been inserted, is not found in it. The legislature, having omitted the word "build," it is assumed that the intention was to authorize building. But it was only intended to leave untouched the commerce in ship-building, provided there was not the equipment or fitting out prohibited by the Act. It was not the object either to encourage or interfere with the building of ships. The statute is not directed against the shipbuilder, but the procurer of equipment with a warlike object. If a builder cannot build a ship for a warlike purpose without equipment, it was sufficient to use the words equip, fit out, furnish, or arm, without the word "build." In the case of *The Santissima Trinidad* (c), it was held that a builder was at liberty not only to build, but to equip and arm a ship and take it abroad as the subject of merchandize, because there was an absence of intent that the ship should be employed in any belligerent service: *Moodie v. The Ship Brothers* (d), and *Moodie v. The Ship*

(a) 5 C. Rob. 325.

(b) Id. Appx. No. 1.

(c) 7 Wheaton Amer. Rep 283.

(d) Bee's Amer. Rep. 76.

Alfred (a), illustrate the same principle. There the ships were equipped as privateers at a time when it was supposed that war would break out between the United States and Great Britain; but, the expected war not having taken place, the ships were sold, fully equipped and armed, to a belligerent power; and it was held that the sale was legal, because they were not equipped with the prohibited intent. Then it is said that there must be a ship in existence, because the ship is to be forfeited. But the liability to forfeiture would have reference to the condition in which the ship was found, however imperfect. The Act aims at prevention, not punishment; and it is enough if there is evidence of an attempt or endeavour to do that which, if completed, would be an equipment within the Act. The 8th section (*b*) has a totally different purpose from the 7th. It prescribes the limit of hospitality to be afforded to vessels of war of a belligerent state, by confining it to things not within the description of augmentation of force, or addition of any equipment for war. By universal practice, ordinary hospitality for repairs and additions necessary for navigation is allowed to ships of war of a belligerent state, and the object of the 8th section is to confine it within the narrowest limits, more so than the American Act, in which the words are "*solely* applicable to war." But because the 8th section uses the words, "any equipment *for war*," while the 7th uses the word "equipment" only, it is inferred that, while the legislature has strictly prohibited an augmentation of the warlike force of existing ships of war, it meant to allow the construction of ships of war for a belligerent, provided they were not fully equipped for warlike purposes. If so, though an additional port-hole cannot be made, or a single gun added to an existing ship of war, or its bulwarks made stronger, yet a new ship of war may be brought into a con-

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(a) 3 Dallas Amer. Rep. 307.

(b) *Ante*, p. 461, note.

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dition to go to sea and commit hostilities, provided her equipments are not of a distinctively warlike character. The two sections are consistent: the 7th prohibits the equipment, or attempt to equip, a new ship of war; the 8th prohibits the augmentation of the warlike force of an existing ship of war. The use of the term "equipment *for war*," in the 8th section, while in the 7th it is "equipment" only, shews that the equipment prohibited by the 7th section need not necessarily be of a destructive and warlike character.

The authorities are exclusively from the United States. *The British Consul v. The Ship Mermaid* (a) was a case of restitution of prize, on the ground that the ship which took the prize had been fitted out, or had her force augmented, within the United States unlawfully, and in violation of their neutral rights. Her quarter deck had been taken away, all decayed timbers and planks repaired, and her ports opened, but it was found as a fact that it was done without any intention to violate the law. In *Benjamin Moodie v. The Ship Brothers* (b), the question was whether there was any addition of equipment solely applicable to war within the 5th section of the American Act. The vessel was a privateer, and when she was repaired, two of her ports were altered. The Court considered that not an additional equipment, as the Act only prohibited such additions as augmented the warlike force. These cases shew that alterations in the structure of the vessel may come within the terms "equipment," and "fitting out." *The United States v. Guinet* (c), and *The United States v. Quincy* (d), support that view. *The United States v. Gooding* (e) was decided upon the American Slave Trade Act of the 20th April, 1818, c. 91, the 2nd section of which prohibits the "fitting out" of any ship in any port

(a) Bee's Amer. Adm. Rep. 69.

(d) 6 Peters, 445.

(b) Id. 76.

(e) 12 Wheaton's Amer. Rep.

(c) Wharton's State Trials, 95. 460, 472.

of the United States for the purpose of procuring negroes to be transported as slaves; but the principle of that decision is applicable to this case (a). The same doctrine was laid down in the *Plattsburgh* (b). In the *Terceira Case* (c)

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(a) The following passages in the opinion of the Court, delivered by *Story, J.*, were cited:—"The third instruction turns upon the point, whether the fitting out, in the sense of the Act of Congress, means a complete equipment, so that a partial equipment only will extract the case from the prohibition of the statute. This objection appears to us to proceed from a mistaken view of the facts applicable to the case. If the vessel actually sailed on her voyage from Baltimore, for the purpose of employment in the slave trade, her fitment was complete for all the purposes of the Act. It is by no means necessary that every equipment for a slave voyage should have been taken on board at Baltimore; or, indeed that any equipments, exclusively applicable to such a voyage, should have been on board. The presence of such equipments may furnish strong presumptive proof of the object of the voyage, but they do not constitute the offence. The statute punishes the fitting out of a vessel with intent to employ her in the slave trade, however innocent the equipment may be, when designed for a lawful voyage. It is the act combined with the intent, and not either separately, which is punishable. Whether the fitting out be fully adequate for the purposes of a slave voyage, may, as matter of presump-

tion, be more or less conclusive; but if the intent of the fitment be to carry on a slave voyage, and the vessel depart on the voyage, her fitting out is complete, so far as the parties deem it necessary for their object, and the statute reaches the case.

But we are also of opinion that any preparations for a slave voyage, which clearly manifest or accompany the illegal intent, even though incomplete and imperfect, and before the departure of the vessel from port, do yet constitute a fitting out within the purview of the statute."

(b) 10 Wheaton's Amer. Rep. 133, 141. The following passage in the opinion of the Court, delivered by *Story, J.*, was cited:—"Assuming the equipments were all innocent in their own nature, that would not help the case, if there were positive proof of a guilty intention. The law does not proceed upon the notion that provisions or equipments which are adapted to ordinary voyages are not within the forfeiting clause, if they are intended for carrying on the slave trade. Nor is it necessary that there should be complete equipments for this purpose. It is sufficient if any preparations are made for the unlawful purpose. Such was the doctrine of this Court in the cases formerly adjudged, which were cited at the bar."

(c) *Ante*, p. 465.

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there was a clear violation of the Foreign Enlistment Act, and the only question was whether the Government was justified in pursuing her and preventing the landing of her troops.

The direction of the learned Judge tended to mislead the jury. The first proposition was, that if the vessel was in the course of building for the purpose of being delivered in pursuance of a contract, the transaction was lawful. On the other hand, if there was an intention that in the port of Liverpool, or any other English port, the vessel should be equipped, fitted out and furnished, or armed for the purpose of aggression, the case was within the Act. But the equipment may be for the purpose of aggression whether under a contract or not. The proper question was whether there was any intention in the port of Liverpool, or any other English port, that the vessel should be equipped, fitted out, furnished, or armed, for the purpose of aggression, or whether, that not being the intent, she was merely in the course of building for the purpose of being delivered in pursuance of a contract, without any purpose of aggression. The learned Judge told the jury that, according to his construction of the 7th section, as it was lawful for a person to build and equip a ship for the purpose of offering it for sale to a belligerent, therefore it was lawful for a belligerent to employ him to build and equip it. But that is erroneous. Where a belligerent employs the ship builder, there is a warlike intent. To say that because a ship may be built as a commercial speculation, and taken abroad and sold to a belligerent, therefore it is lawful to build a ship under a contract with a belligerent, is to abrogate the distinction which the statute has introduced. The proposition goes to this extent: that because a person may take abroad as a commercial adventure, and sell to a belligerent, a ship equipped, armed, and manned, he may also execute in this country an order from

a belligerent for a ship to be built, equipped, armed, and manned. In the case of *The Santissima Trinidad* (a), if what was done to the "Independencia," at Baltimore, had been done under an order of the Government of Buenos Ayres, it would have been a violation of the American Act, for the ship was fully armed when she left the United States. The learned Judge also ruled that the equipment must be of a warlike character to some extent, per se; not merely ancipitus usus, and shewn to be of a warlike character by intention. The learned Judge withdrew from the consideration of the jury the important question for what service the ship was intended, and the jury may have thought that the reason why that question was not submitted to them was, that it was lawful for a ship builder in this country to execute any order whatever for a belligerent, if he might, as a commercial speculation, have sent abroad the same material for sale to belligerents. The ruling in effect amounts to this:—"Assuming that this ship was built under the orders of the Confederate belligerent Government as a gunboat for their service, unless you believe that she was intended to receive further equipments of such a distinctively warlike character as would enable her, on leaving the port of Liverpool, to commit hostilities, she is not within the Act." The question, as finally stated, would lead the jury to suppose that they were to consider whether the object of the builder was to equip, furnish, fit out, or arm, or to build in obedience to an order and in compliance with a contract; because the language applies, not to the Confederate Government and their agents, but to the builder only. It was the duty of the learned Judge to give the jury some explanation of the statute. In *Elliott v. The South Devon Railway Company* (b), this Court granted a new trial, because a Judge omitted to explain to the jury in what

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(a) 7 Wheaton's Amer. Rep. 283.

(b) 2 Exch. 725.

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sense the legislature used the word "town" in the Railway Clauses Consolidation Act, 8 & 9 Vict. c. 26, s. 11.

They then argued that the verdict was against the weight of evidence; that, under the 14 & 15 Vict. c. 99, s. 2, it was competent for the claimants to give evidence on their own behalf, and they were not rendered incompetent by the 18 & 19 Vict. c. 96, s. 36, and 20 & 21 Vict. c. 62, s. 14; also that the Court might grant a new trial in this case. On the last point they referred to Manning's Exchequer Practice, p. 180; Bateman's Excise Law, p. 66 note.

*Cur. adv. vult.*

The learned Judges having differed in opinion, the following judgments were delivered in the ensuing Term (Jan. 11).

POLLOCK, C. B.—This was an information against the ship "Alexandra," charging that the defendants, with others, had been guilty of a violation of the Foreign Enlistment Act in respect of that vessel. The ship "Alexandra" had been built and partly rigged at Liverpool, and had been seized on the 6th of April by an officer of the Customs, on the ground of a breach of the 7th section of the statute. The defendants claimed the ship, and pleaded that the ship was not forfeited. The information charged them with every possible violation of the Act as to *equipping, furnishing, and fitting out*, but omitted to charge anything in respect of *arming*. The cause was tried before me on Monday the 22nd of June, and three following days. The evidence for the Crown clearly established the warlike character of the vessel—it was not at all adapted for commerce, but was capable of being adapted for warlike purposes; and though it might have been used as a yacht, according to the evidence of Captain Inglefield, it was in all probability intended to be used by the so-called Confederate States as a vessel of war, when adapted for that purpose by *them* (suitable equip-

ments and fittings-up being furnished). And if the making, in pursuance of an agreement or order for that purpose, with intention to sell and deliver to one of the belligerents the hull of a vessel *suitable for war, but unarmed*, and not equipped, furnished, or fitted out with anything which enabled her *to cruise or to commit hostilities*, or *to do any warlike act whatever*, be a violation of the Foreign Enlistment Act, my direction to the jury was wrong in point of law; the verdict ought to have been for the Crown, and there ought to be a new trial; but if the commerce of this country in ships, whether ultimately for peace or war, is to continue, and provided a ship leaves the ports of this country in no condition *to cruise or to commit hostilities*, though she may be of a warlike character, there has been no violation of the statute, then the verdict was right. And in substance this is the question between the Crown and the defendants, stripped of all technicalities.

The condition in which the vessel (unfinished when she was seized) was intended to leave this country was, perhaps, not perfectly clear, but there was no direct evidence that she was to be made, at Liverpool or in any other British port, fit to cruise or to commit hostilities. I told the jury, in substance, that the sale of a ship was, in my judgment, perfectly lawful, even of a ship so constructed as to be convertible into a ship of war; that the sale of arms and ammunition and every kind of warlike implement was not forbidden by any law, either international or municipal, and that I thought that a ship capable of being used for war might be made and sold, as well as sold (if made), provided she did not leave a port of this country either armed or equipped, or furnished or fitted out within the meaning of the statute; that is to say, with intent or in order to cruise or commit hostilities against a state or power with whom her Majesty was not at war.

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There was no direct evidence that the vessel was intended to be armed at any British port with intent on the part of any of the defendants, or indeed of any one, to cruise or commit hostilities; indeed there was no charge in the information on the subject of *arming* at all, and there was no direct evidence of any intention, to equip, furnish, or fit out the ship with intent to cruise or commit hostilities according to what I think is the true meaning of the charge in the information. I, however, left the question to the jury in the terms of the act of parliament, and upon this direction with the evidence before them the jury found a verdict for the defendants.

In Michaelmas Term the Attorney General applied for a new trial, and obtained a rule to shew cause, on the grounds stated in the rule, why the verdict should not be set aside and a new trial had. Cause was shewn during the Term, and the argument lasted six days. We have now to deliver the judgment of the different members of the Court.

It is material, I think, first to call attention to the various charges contained in the information, which consists of ninety-eight counts. The 97th and 98th counts relate to an intent to employ the ship as a transport or store ship as well as to commit hostilities. These counts were given up at the trial by the then Attorney General. The remaining ninety-six counts consist of the first eight counts repeated twelve times, merely varying the offence charged. The first eight counts charge that the defendants did *equip*, the next that they did *furnish*, the next that they did *fit out*, and so on. Then all the varieties of *attempting*, *procuring*, *aiding*, &c., are introduced, making the total eight times twelve, or ninety-six counts. The Attorney General at the trial said, "The first eight counts are those only to which any attention need be paid," not meaning to abandon the rest, but intimating that the first eight represented all the rest.

I propose to state in substance what those eight counts are.

The first count charges that the defendants, without the leave, &c., did equip the vessel with intent and in order that such ship or vessel should be employed in the service of the Confederate States with intent to cruise and commit hostilities against a certain foreign state with which her Majesty was not then at war, to wit, the Republic of the United States. The second count resembles the first, but charges that hostilities were to be committed against the *citizens* of the foreign state. The third count charges that the defendants did equip, with intent to cruise and commit hostilities against a foreign state with which her Majesty was not then at war. The fourth count is similar to the third, varying the description of the parties against whom hostilities were to be committed. The fifth, sixth, seventh and eighth counts are similar to the first and second, varying only the description in the first and second counts of the belligerent parties who were affected by the conduct of the defendants. The charge, therefore, resolves itself into a charge of equipping, &c., with a certain intent, the intent being stated in two different ways, or a charge of attempting, endeavouring, &c., to equip, or procuring to be equipped, with the same two intents in different counts. If what was intended to be done would not, when done, amount to an equipping, &c., within the Act, then there would be no attempting or endeavouring, &c., contrary to the Act.

The question then arises what is the true construction of the Foreign Enlistment Act, particularly of the seventh section of that statute, upon which the information in this case is framed; and what is the meaning of the words "equip, furnish, or fit out" in that section; and also what is meant by the expression, "with intent to cruise or commit hostilities?"

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It is a highly penal statute, creating a new crime or misdemeanor, making those who commit it liable to fine and imprisonment, if found guilty, and the ship, the subject of the crime, liable to forfeiture. The attempt or endeavour to commit the offence, or the procuring it to be committed, or the aiding, assisting, or being concerned in the commission of it, is each made criminal, and liable to the same punishment and forfeiture.

In order to have a comprehensive view of the whole subject, it may be useful to become acquainted with the history of the statute and of the Act of the American Congress, which is said to have given rise to it. It may be useful also to learn what have been the opinions (differing, it may be observed, widely from each other), of learned jurists and of eminent statesmen, not always agreeing, on the subjects of international law, belligerent rights, and neutral duties. But none of these can furnish even the semblance of authority for construing an English act of parliament, which creates for the first time an indictable offence rendering the party found guilty of it liable to fine and imprisonment, and his property liable to forfeiture; and it should be borne in mind that the property is not forfeited unless the crime has been committed. I, perhaps, may here remark that neither on the trial nor during the argument, has any one suggested by name who has committed the crime, what he did in committing the crime, or what are the acts and who are the persons by whose conduct a ship of the value of the "Alexandra" has become forfeited and seized by the Crown. If the statute in terms reasonably plain and clear makes what the defendants have done a punishable offence within the statute, we want not the assistance which may be derived from what eminent statesmen have said, or learned jurists have written on international law or belligerent rights; we want not the

decisions of American Courts to see whether the case before us is within the statute; but no opinions of jurists, no decisions of foreign Courts, will enable us, or ought to induce us to declare, if the act be not within the words of the statute, that the scope and object, the spirit and intention of the statute include the case before us, though it be not plainly and clearly expressed by the legislature. We have had in this country no Court of Criminal Equity since the Star Chamber was abolished, as Lord *Campbell* called it in a case which was tried before him, viz. *The Emperor of Austria v. Day*, which is to be found in 3rd De Gex, Fisher & Jones' Reports, 217, 239.

Mr. Justice *Blackstone* well lays down the rule in the 1st volume of his Commentaries, p. 92:—"The freedom of our constitution will not permit that in criminal cases a power should be lodged in any Judge to construe the law otherwise than according to the letter." Our institutions were never more safe in my opinion than at the present moment, but we cannot afford at any time to lose any of the grounds of our security, and no calamity would be greater than to introduce a lax or elastic interpretation of a criminal statute to serve a special but a temporary purpose. And here I may notice, in order to dispose of it, the argument of the Attorney General, about construing a statute, even a penal statute, so as to suppress the mischief and advance the remedy. He cited Plowden, 205, and the resolutions in *Heydon's Case* (a). But all the penal statutes alluded to there, and in all the places where that doctrine is to be met with, are statutes which create some disability or forfeiture; none of them are statutes creating a crime, and I think it is altogether a mistake to apply the resolutions in *Heydon's Case* to a criminal statute which creates a new offence.

The distinction between a strict construction and a more

(a) 3 Rep. 7 a.

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free one has, no doubt, in modern times almost disappeared, and the question now is : What is the *true* construction of a statute? If I were asked whether there be any difference left between a criminal statute and any other statute not creating a crime, I should say that in a criminal statute you must be quite sure that the offence charged is within the letter of the law. No doubt there are some other cases to which the statute is to be applied, unless you are quite sure of the contrary, namely that the case is not within the law.

As to this particular statute having for its object *prevention*, and not *punishment*, which was pressed upon our attention more than once, that is not a matter peculiar to this statute. I apprehend that this statute has that object in common with all other criminal statutes that were ever passed, which are all intended, not to punish guilt, but to prevent crime. And as to the recital that the existing law was not sufficient, to which our attention was particularly called, I presume that that recital really belongs also to every statute of every sort, whether mentioned in it or not—for, if the law be sufficient, the statute is a piece of superfluous legislation.

So also, I think that we have nothing to do with the political consequences of our decision or the dissatisfaction which it may create in any quarter anywhere, and I cannot help expressing my regret, not unmixed with some surprise, that the learned Attorney General has more than once adverted to the consequences that may arise from our holding that what the defendants have done is not contrary to our municipal law. That it is not contrary to the law of nations he has distinctly stated, and indeed made it the subject of an argument (*in another place, as I think they call it*), “that other countries have no right to complain of it as a violation of the law of nations.” On the first day of his argument, he pointed out how the supply of ships would work practically between a powerful country and a weak

one, and he imagined (I am quoting his very words) "this country at war with France, and the dockyards in Sweden supplying, fitting out, and equipping vessels of war for France," and he suggested that we might say, as he says we always have done in the course of our history, "We will not endure it, and if this goes on we will rather go to war with you than let war be carried on practically against us from your shores, under pretence of neutrality. That we should do that with a weak power like Sweden," the Attorney General asks, "can any human being entertain a doubt?" He then goes on to suggest that a great power, like the United States, would adopt the same views, would look broadly at the practical mischief, would care nothing for Vattel, Grotius, or Puffendorf, and would say, "It is in substance as noxious as war, and we will not endure it."

I must say I doubt whether such views and such doctrines ought to be presented to us at all. I am sure that they will not influence our judgment, and I am inclined to suspect the soundness of any proposition of law which requires such a style of argument to support it. Indeed I may add that international law would be of very little use, if it were not to govern the conduct of *strong* nations as well as of *weak* ones. I would rather state the passage in the Attorney General's own words, because I should be very sorry to misunderstand or to misquote anything that fell from him. He says, "Can any one doubt that that is the way in which such a state of things would work practically as between a powerful country and a weak one?" Then he imagines the case of Sweden, and then he says, "That we should do that with a weak power, like Sweden, can any human being entertain a doubt?" I venture to entertain a doubt, and to express a hope that this country would not sully its high character by adopting towards a weak state a line of conduct which it would not think prudent or politic towards a

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stronger one. I certainly had thought that the object of international law was, among other things, to state and define what acts, what conduct of any state, would justify war being made upon it by another state. But the Attorney General seems to think, that if one nation be strong and another weak, the strong one will make war on the weak, though it has no violation of international law to allege against it and to complain of, but merely some inconvenience arising from the neutral state continuing its commercial relations with another power with whom it has been accustomed for a long time to maintain them.

Again, on the second day, the Attorney General said:—
 “The peace and welfare of the kingdom, perhaps of the world, is declared by the legislature to depend” upon this matter. When his attention was called to this from the Bench, he said, that perhaps he was going too far in saying “the peace of the world,” and no doubt he was, for there is not any declaration by the legislature about “*the peace of the world*” at all, and the expression “peace and welfare of this kingdom,” which no doubt is in the preamble, I believe relates, as far as “peace” is concerned, only to that tranquillity which is in the care of the magistracy, and has nothing whatever to do with the relations of peace or war with respect to other countries.

At the end of his address (no doubt conspicuous for its ability) he stated the grounds on which our decision ought to rest, in a manner perfectly unexceptionable ; and I wish that the whole of his argument had corresponded with the dignified and eloquent manner in which it was concluded(a).

(a) The conclusion of the argument of the Attorney General was as follows :—“Now, my Lords, I have concluded all the observations which I have to offer to your Lordships upon this case. I can-

not but think that your Lordships will deal, in a way that will be satisfactory to the Crown and the public, with this case. We are not here in an atmosphere where any argument of prejudice, either

So also I think we have nothing to do with the question as to which construction of the clause is most for the interest of this country as a great maritime power. It is degrading the discussion to make it in any degree turn upon a question of advantage or benefit to be gained or lost; and on such a subject we might turn out to be quite mistaken. In the present enlightened state of the civilized world, it may turn out that that doctrine and those principles are to be

one way or the other, can prevail. The matter has been fully considered, and I have not the slightest doubt that your Lordships' judgment in this case, in the way in which you will deal with it, will be entitled to and will receive from those who may have to comment upon it hereafter, the same respect which has been justly paid to the long series (for it is a long one) of the decisions of the American Courts on a similar Act of theirs. I must say decisions most honorable to the country, and to the tribunals, from which they have proceeded; because that Act was passed, as your Lordships are aware, under circumstances of peculiar difficulty, when the irritation and the animosity resulting from the war of independence had not passed away, when the recent obligations of the United States to France were fresh in their memory, when the sympathies of the whole country ran breast high with the revolutionary party in France and against the powers of Europe who were then at war with the French Republic. Under those circumstances it was that Washington caused to be introduced that Act; and in every

single trial that has ever taken place under it the Judges of the United States have manifested a lofty and most upright determination to give full and fair effect to it, not straining it either in the direction of popular bias or prejudice, or of mercantile interest; and on the other hand, not straining it in favour of the Commonwealth against the subject. We do not wish our own Act to be strained in favour of the Crown against the subject; but we do desire that it shall be established by your Lordships' judgment that those great and most important objects, to promote which that Act was passed, will be found to have been effectually accomplished by that Act, and that the great and most serious mischief which the Act points out as the mischief which it was intended to remedy, may be effectually repressed by the construction which, from your Lordships, that Act shall righteously receive; and that the whole matter may not turn out to have been entirely misunderstood by the Legislature which was engaged upon it, and a futile instrument, incapable of being successfully applied, placed in the hands of the Crown."

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preferred which would make us prosperous in peace rather than those which would make us successful in war.

In construing the statute it is our duty to ascertain the true legal meaning of the words used by the legislature and to collect the intention from the language of the statute itself, either the preamble or the enactments, and not to make out the intention from some other sources of information and then construe the words of the statute so as to meet the assumed intention; and this appears to me to be the mistake of the counsel on the part of the Crown. They say, "Here is a powerful state complaining that what you are doing is as bad as war," and saying "We will not endure it;" and then they say, "The welfare and peace of this country require that the Act should be so construed as to silence that complaint." But we cannot and ought not, even if the matter before us seemed to be within the mischief which it is supposed the statute was meant to remedy, to deal with it as a crime unless it be plainly and without doubt included in the language used by the legislature. In my judgment it is not within the letter of the statute, nor within the spirit, nor was it at all contemplated by those who framed the law.

The danger of travelling out of the statute itself and looking elsewhere for the object of the legislature in passing it, may be illustrated by the wide difference of opinion between the late Attorney General and the present Attorney General upon this very point. The late Attorney General in opening the case to the jury said,—“It appears particularly to have been contemplated by the framers of the Foreign Enlistment Act to enforce the observance of neutrality in the event of war,” which I certainly understand to mean, to compel a compliance with the duties of neutrality, as expounded by international law. But the present Attorney General, in the beginning of his argument in support

of the rule, took quite an opposite view, but I own I think a much more correct one, and said that the whole argument of his speech (in that other place which has been alluded to) was to establish "the directly contradictory proposition," and his language is this, "I say that there were no such obligations, and that it is a total misinterpretation of the municipal law to say that there was any state in the world which, according to the settled and established principles of international law, could have required this country to prohibit those things which were prohibited under that statute," meaning the Foreign Enlistment Act. And even with respect to the "Alabama" (*a*), he intimates that though there had been a breach of the municipal law, there had been (and I think he is quite correct in this) no violation of international law, or anything of which a belligerent at peace with this country had a right to complain.

In endeavouring to discover the true construction of the 7th clause of the statute, the first matter to be attended to is no doubt the actual language of the clause itself as introduced by the preamble; secondly, the words or expressions which obviously are by design omitted; and, thirdly, the connexion of the 7th clause with other clauses in the same statute, and the conclusions which on comparison with other clauses may reasonably and obviously be drawn. I do not mean to exclude other considerations, but these appear to me to be the most obvious and the safest.


The learned Attorney General, with apparent effect, asked "Why do you try to explain a statute by words which are not to be found in it? it is dangerous to adopt such a course." On the first impression the objection seems not at all unreasonable; but the answer, on a very little consideration, is quite obvious. In order to know what a statute *does* mean, it is one important step to know what it *does not* mean; and if it be quite clear that there is something which it *does not*

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(*a*) *Antè*, p. 467, notes (*a*), (*b*).

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mean, then that which is suggested or supposed to be what it *does* mean, must be consistent and in harmony with what it is clear that it *does not* mean. What it *forbids* must be consistent with what it *permits*. The 7th section contains the words “equip, furnish, fit out, and arm,” but does not contain the word “build,” and I think no one can doubt that that word was purposely omitted from the Act of Congress and from our own statute.

I am not surprised that the Attorney General was desirous of preventing this mode of investigation, because it leads in my judgment irresistibly to this conclusion, that whatever might be done in the way of mere building before the statute, may now be done notwithstanding the statute. In common honesty and candour it cannot be suggested that the legislature meant to suppress the mere building of ships for a belligerent (as it were by a side wind), and to suppress their trade without exciting their alarm. I think, therefore, I may pronounce with confidence that it is lawful now to build ships, and even to build ships for war. The shipbuilders of this country for above a century have built ships for almost every nation on the earth, some for warlike purposes, and some for commercial. Ship-building is one of the most considerable of our industrial and commercial pursuits. Building ships is not prohibited, even building ships for war is not prohibited, provided they be not “*equipped, furnished, fitted out, or armed*” in our ports, with either of the intents stated in the 7th section, and the words “*equip, furnish, fit out, or arm*” with the *intent stated in the 7th section* ought to be construed (if they can be so construed) so as to leave the commercial interest of shipbuilders untouched. If the comparison of the 7th section with other sections in the Act makes a certain proposition clear and undoubted, the Act must be construed accordingly, and ought to be so construed as to make it a con-

sistent and harmonious whole. If after all it turns out that that cannot be done, the construction that produces the greatest harmony and the least inconsistency is that which ought to prevail. I cannot understand how in the same breath it can be admitted that the question is far from being free from difficulty, and yet a construction is called for to create a crime and embarrass an important branch of British industry.

A comparison of the 7th section with the 2nd leads me to a conclusion quite different from that at which the learned Attorney General arrived. With respect to the 2nd section, it did not escape him that the offence created by the 2nd section is in a natural-born British subject an offence everywhere, in the realm or out of it. To use his own expression, "the net is thrown as wide as the entire world," and enlistment anywhere is the matter forbidden. Not so the 7th section; the acts forbidden by the 7th section are forbidden to her Majesty's subjects in her Majesty's dominions *only*, elsewhere they are no offence at all; and the Attorney General failed to draw the conclusion which to my mind is irresistible, namely, that neither the act nor the intention is so much the object of the legislation as the *place*; it is the place (a British port here or abroad) which is made sacred. Let the shipbuilder, though a British subject, take his capital and materials elsewhere, and he may build what ship he pleases, and arm it and equip it as he likes, for the use of any belligerent not at war with this country; and with whatever intention he is actuated, if he commits no act of hostility, he neither violates international law nor commits any breach of the Foreign Enlistment Act. The great object of the statute, therefore, was not to prevent the building of ships by British shipbuilders for one of two belligerents, with neither of whom we were at war, but to preserve the ports of this country from being made ports of

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hostile equipment against a friendly belligerent; it was not in any way to fetter the commerce of this country or the trade of shipbuilding beyond what was necessary for that purpose.

If it were important to prevent ships from being equipped, furnished, fitted out, or armed with the intents mentioned in the 7th section, by British subjects, it might have been made the subject of universal prohibition, as far as British subjects were concerned, as easily as enlistment, but the prohibition does not go beyond the ports of the British dominions.

Again, a comparison between the 7th section and the 8th throws also some light on the meaning of the words used in the 7th section, and on the object with which it was framed. The 8th section of the British statute makes it a misdemeanor to add to the number of guns or to change them for others, or by the addition of any equipment for war to increase the warlike force of any ship or vessel of war, or cruizer, or other armed vessel, which at the time of her arrival in any port of the United Kingdom was in the service of any foreign prince or government, or of any person or persons exercising or assuming to exercise any powers of government. In short, it forbids any one in this country to increase the warlike force of any vessel of war or armed vessel not belonging to the sovereign of this country. In this it differs from the corresponding clause in the Act of Congress (which is the 5th) which forbids the increase of warlike armament to a ship of war only when it is for a state at war with a state or people with whom the United States are at peace. But in this country the increase of the warlike armament of any foreign ship of war is not permitted at all. Whether it belongs to a state at peace or at war with those with whom we are not at war is no question; our ports are not to be disturbed by a

warlike armament at all. But then everything or anything else may be done for the purpose of mere navigation; any sea damage to the ship or tackle may be repaired. If a vessel be capable of repair, she may be equipped, furnished, and fitted out; if a steamer, she may be supplied with coals, in order that she may reach a port of her own country in safety. One conclusion clearly to be drawn from this is, that whereas in the United States foreign vessels, vessels of war, of one belligerent were not allowed to increase their warlike force if the United States were at peace with the other belligerent, in the British dominions a foreign vessel of war is not allowed to increase its warlike force at all under any circumstances. The one may be ascribed to some doctrine of neutrality; the other to a wish to preserve the peace of the British ports, and not to allow them to be made places of warlike equipment for foreign vessels at all.

But there is another result more worthy of observation. It is, I presume, conceded that a Federal vessel of war, damaged by storm, may put into an English port, and may refit and repair so far as is necessary to make it again navigable in order to reach its own country. The 8th section of the statute by implication permits all that it does not forbid. A Federal vessel of war coming into our ports would be allowed no doubt to repair sea damage and to supply lost stores, in order to reach some other port, but the shipbuilder in our port would be equipping, furnishing, and fitting out that vessel knowing that the commander might cruize and commit hostilities against the so-called Confederate States. But does the shipbuilder commit a misdemeanor? Certainly not. Or is the vessel forfeited? Certainly not. If the argument for the prosecution be well founded, and the construction of the statute by the counsel for the Crown be correct, the shipbuilder who

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repaired any damage to a vessel of war belonging to either of the belligerents would be liable to a prosecution as much as any of the present defendants.

I now come to the 7th section itself, and to the terms in which the statute enacts that persons doing certain acts with a certain intent shall be deemed guilty of a misdemeanor. It is necessary carefully to separate the act itself from any attempt or endeavour to commit it, and to simplify the inquiry as to how the statute should be construed. I will take, as the information does, one of the prohibited matters, "equip," for instance, and examine that alone, without reference to the others, and without reference to attempting, procuring, aiding, assisting, &c. The clause would then run thus:—"If any person within any part of her Majesty's dominions, in the United Kingdom or beyond the seas, without the leave and licence of her Majesty, shall equip any ship or vessel with intent, or in order that such ship or vessel shall be employed in the service of any foreign state or government as a transport or storeship, or with intent to cruize or commit hostilities against any state or government with whom her Majesty shall not then be at war, every such person so offending shall be deemed guilty of a misdemeanor." Two questions obviously arise upon the construction of these expressions,—1st. Whose intention is it which is meant by the Act? and, 2ndly. What is the meaning of the word "*equip*?" It is difficult to make out what was the intention of those who framed this clause, as to the manner in which it should be broken up into parts, and then be put together so as to present all the alternatives contemplated. Probably, I think one may say certainly, it could not mean that "with intent and in order that such ship or vessel should be employed in the service of any foreign prince, state," &c., "as a transport or store ship," should stand alone without some subsequent matter being


added, for that would make it a misdemeanor to furnish a transport or store ship to any foreign prince, &c., without any regard to his being at peace or war with any state or government with whom the sovereign of this country should not then be at war.

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It is probable that the words "against any foreign prince, state," &c., should follow the word "storeship;" and then the effect of the clause would be to make it a misdemeanor to equip a ship or vessel as a storeship with intent and in order that such ship should be employed in the service of any foreign prince, &c., as a transport or storeship against any prince, state, &c., with whom our sovereign should not then be at war, or *with intent* to cruize and commit hostilities against any such prince, state, or potentate; and some twenty-four of the ninety-eight counts are founded upon this view of the section. Or the alternative may be, "as a transport or storeship, or with intent to cruize or commit hostilities," &c.; and then the effect of the clause would be to make it a misdemeanor to equip a ship with intent or in order that she might be employed by one belligerent as a transport or with intent to cruize or commit hostilities against the other.

It is certainly to be regretted that the wisdom and sagacity which the Attorney General discovers in adjusting the verbal differences between our statute and the prior Act of Congress, were not exercised in baffling the enemy of the Bill, who, by levelling it at transports and storeships, as well as ships of actual war, has thrown the whole clause into great confusion, which I presume it is suggested that he meant to do by speaking of him as "not originally a friend to the Bill," and as having made the alteration "in Committee." But neither this Court, nor any other Court, can construe any statute, and least of all a criminal statute, by what counsel are pleased to suggest, were alterations made in


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Committee by a Member of Parliament, who was "no friend to the Bill," even though the Journals of the House should give some sanction to the proposition. This is not one of the modes of discovering the meaning of an Act of Parliament recommenced by Plowden, or sanctioned by Lord Coke or Blackstone. Where two intents are mentioned, and they are put in the alternative, thus, an intent to do such a thing, or an intent to do another, the obvious and the grammatical mode of reading the clause would be to make the two intentions the alternatives—but most of the counts in the information (about seventy-two) combine the two intents together, and in effect turn "or" into "and," and charge the defendants with "equipping," &c., the ship, with intent that the ship should be employed in the service of one belligerent with intent to cruize and commit hostilities against the other belligerent, with which her Majesty was not then at war. If this mode of reading the 7th section be not correct, seventy-two of the counts are improperly framed, and the statute does not warrant their making any such charge. But, assuming it to be correct, then the question arises whose intent does the information mean? Who is it that the information charges with an intent to cruize and commit hostilities? According to all the rules of pleading, it must be the intent of the person committing the act; and this view would make all the counts in substance to mean much the same thing; that is to say with reference to the intent. 'There was no direct evidence that the persons "equipping, fitting out," &c., or "aiding, assisting," &c., "in equipping," &c., had any intention to cruize or commit hostilities at all; and, if so, the whole charge would fail altogether. The Attorney General would read, "with intent to commit hostilities," as if the expression were, *with intent that hostilities should be committed by somebody*; but that mode of reading the expres-

sion is contrary to the rules of pleading and to all authority on the subject: and especially it seems to me to be contrary to what was decided in *The United States v. Quincy*, of which a full report is given in the appendix to the trial. I wish to call particular attention to this case, and to the two answers of Mr. Jefferson (a), referred to by the Solicitor General in the course of his argument. I think that those answers lead to a construction quite different from that suggested by the counsel for the Crown. Mr. Jefferson's answers clearly shew what was the opinion of the American Government; and the decision of the Supreme Court, in *The United States v. Quincy*, is the best authority as to the state of the law. The first answer refers to arms and ammunition—not to ships at all. Mr. Jefferson says, "Our citizens have been always free to make, vend, and export arms. It is the constant occupation and livelihood of some of them. To suppress those callings (the only means, perhaps, of their subsistence), because a war exists in foreign and distant countries, in which we have no concern, would scarcely be expected. It would be hard in principle and impossible in practice."

Why, I would ask, should not this view of the subject of industrial pursuits apply to ships and shipbuilders in England? In America it apparently does apply. The second answer relates to ships, but Mr. Jefferson does not say anything in disapprobation of a mere supply of ships, even ships of war. What he says is this, "But the practice of *commissioning*, equipping, and manning vessels in our ports to cruize on any of the belligerent parties is entirely disapproved, and the government will take effective measures to prevent it," and accordingly the 3rd section of the Act of Congress is directed against fitting out and arming, and also against commissioning. The 7th section of our Act is directed against equipping, furnishing, fitting out, or

(a) *Antd*, p. 478, note (a).

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arming, and also against commissioning. But there is not a single syllable against shipbuilding, or selling, or making for sale, ships, even of a warlike character. So with respect to the law and the construction of the American Act of Congress. The judgment delivered by Mr. Justice *Thompson* in the United States, in the case *The United States v. Quincy*, gives to the citizens of the United States a right to send armed vessels out of their ports. It aims at preventing the citizens *themselves* from committing hostilities against foreign powers at peace with the United States, but leaves them at perfect liberty to sell the vessel to one of the belligerents, and provided hostilities are not committed by the citizens of the United States there is no breach of the law. The accompanying remark of the learned Judge which immediately follows, proves that the Attorney General is endeavouring to enforce against British shipbuilders a principle which the Supreme Court of the United States altogether repudiates as applicable to citizens of the United States. If our statute was passed to give to the United States and other countries the same advantage that their Act of Congress gave to us, there may be a reciprocity in words, but there is no reciprocity in reality and in construction if the argument for the prosecution is to prevail. Mr. Justice *Thompson* says, "All the latitude necessary for commercial purposes is given to our citizens, and they are restrained only from such acts as are calculated to involve the country in war," which I understand to mean, that the citizens of the United States have a right to build what ships they please, and dispose of them as they please, provided they do not themselves take part in the war, and the ships are not employed by them to commit hostilities. And what pretence is there for giving to our Foreign Enlistment Act, with respect to shipbuilding, a construction totally different from that which the Act of Congress bears,

according to the judgment of the American Judges themselves in their Supreme Court?

There is, indeed, a difference of expression between the Act of Congress and our statute; they have merely the words "with intent," we have "with intent or in order." The Attorney General says that he supposes that the words "in order" were added to avoid some evasion or quibble. I believe that they were added to leave no doubt as to the meaning; the expression "in order" is explained in Todd's Johnson to signify "means to an end," and Jeremy Taylor, Tillotson, and Swift, are quoted as authorities; the passage from Swift is, "One man pursues power in order to wealth" that is, power is the "means," wealth is "the end." And the 7th section forbids equipping a ship or vessel as a "means" to the "end" of cruising, or committing hostilities. In all common sense and understanding, if the nature of the equipment has no reference whatever to the commission of hostilities, it cannot be the "means to that end," and there is no breach of the statute by that sort of equipment. Webster's American Dictionary gives precisely the same explanation of the words "in order." And this leads me to remark that even the word "intent" alone, and without "in order," which is put in, as, I think, to explain it and give it the true meaning which an English lawyer would assign, ought not to lead to a different conclusion. The Attorney General seems to think that if there be an intent, and if anything of whatever kind be done in pursuance of it, that is sufficient. With great respect for the opinion of so eminent a lawyer, in my judgment that is not sufficient. If a statute simply made it a felony to attempt to kill any human being, or to conspire to do so, an attempt by means of witchcraft, or a conspiracy to kill by means of charms and incantations, would not be an offence within such a statute. The poverty of language compels one to

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say "an attempt to kill by means of witchcraft," but such an attempt is really no attempt at all to kill. It is true the sin or wickedness may be as great as an attempt or conspiracy by competent means; but human laws are made, not to punish sin, but to prevent crime and mischief.

I am, therefore, of opinion, that the 7th section should be construed as if the words were "if any person," in the places mentioned, "shall, without the leave, &c., equip, as a means, any ship or vessel to the end that such ship shall cruize or commit hostilities;" and so read, if after all the equipping or furnishing or fitting out the ship is incapable of cruising or committing hostilities, there has been no such equipping, &c., as the statute was intended to prevent.

And this brings me to the meaning of the words "equip, furnish, fit out," and "arm," for they must all be considered together; and the question is not so much what did the legislature mean, as what is the meaning of what they have said—of the words they have used. A clause, admitted to be awkwardly framed, by no means free from difficulty and of considerable doubt, was scarcely worth the very minute criticism and comparison which it has received; but on the part of the prosecution it is contended that the 7th clause was meant to put ships constructed for war or adapted to war upon a footing different from any other munitions of war; to leave cannon of every description, arms of all sorts, gunpowder, and shot and shell, to be freely supplied to either belligerent, but that no ship or vessel of a warlike character in any respect was to be furnished to a belligerent with whom this country was not at war. If this had been the object of our legislature, it might have been accomplished by the simplest possible piece of legislation; it might have been expressed in language so clear that no human being could entertain a doubt about it, instead of the awkward, difficult, and doubtful clause, which it is admitted on the

part of the Attorney and Solicitor General, we have to deal with. It cannot be suggested that the object was to conceal from the shipbuilders the ultimate effect of the clause, and to prevent a clamour on the part of the builders of ships, that they were interfered with in a way which the casters of cannon and the makers of gunpowder were not. There is not a syllable in the Act of Parliament, nor in anything connected with it, nor in any cotemporary proclamation, speech, or publication of any kind professing to put ships on a footing different from any other implement of war; and it was admitted most distinctly by the Attorney General, and I think correctly enough, that there was no foundation for any such distinction in international law. But what is the ground of this distinction between cannon, ammunition, and other articles of that description, and ships? I think it was insisted upon entirely without any sufficient foundation. The Attorney General says, as I understand him, that as far as international law is concerned, there is no distinction between them, and that the distinction arises from our municipal law. He entirely agrees with me upon the subject, except as far as the municipal law makes a difference. His expression is, "I entirely subscribe to what fell from the Lord Chief Baron, at the trial, that it could make no difference whether there was a sale of a thing ready made without a previous contract, or a delivery under a contract." No doubt, he says, that would be so if no legislation made a difference, and he considers that the Foreign Enlistment Act made that difference, and his reason is a singular one. He says that her Majesty has the power whenever she pleases to prohibit every other species of contraband trade, but that she has no power to deal with a ship, so that ships are left out, to be dealt with under the Foreign Enlistment Act. The present statute forbidding the exportation of arms, ammunition, and so on

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is the 16th and 17th of Victoria, passed in 1853, founded on a statute, the 3rd and 4th of William the 4th, chapter 52, passed in 1833. I cannot find in the Index to the Statutes any earlier one. So that the construction of the Foreign Enlistment Act passed in 1819, is apparently made to turn upon an Act passed in 1833.

The result of the argument on the part of the Crown seems to be this. A shipbuilder may build a ship altogether of a warlike character, and may arm it completely with the latest and most mischievous invention for the destruction of human beings, and may then sell it to one of two belligerents, with a perfect fitness for immediate cruising, and ready to commit hostilities the instant it is beyond the boundary of neutral territory, provided there was no previous contract or agreement for it. But if there be any contract or agreement for it, it cannot be made to order with the slightest warlike character about it, though this be part of the accustomed and usual trade of this country, and though the ship leaves our shores a mere hull utterly incapable of cruising or committing hostilities, and as far as war is concerned as innocent and harmless as the mere timber would be of which it is built. The means of evasion which this furnishes is obvious. A signal, a word, a gesture, may convey an order wholly incapable of being proved. It is unnecessary to dwell upon this; it is at once perfectly obvious; and the real difference between a crime and an act of commerce may, in point of evidence, entirely disappear. To use an expression borrowed from one familiar in Westminster Hall about a coach and six, a whole fleet of ships might sail through such an Act of Parliament as this, if this be the meaning of it; and we are to believe that our legislators exhausted all their wisdom in settling the language of the 7th clause, and had none remaining to perceive the enormous loophole which they had left.

Again, a British subject may buy a vessel of war rejected by our navy, fit it up and arm it, and sail with it to a port of either belligerent to sell it; but if either belligerent should, by an agent, purchase it at a public sale by auction, he cannot put a mast into it, or hoist a sail to reach his own country; but an armed vessel of either belligerent may come into our ports and obtain whatever mere naval but not warlike stores she may require, so as to enable that ship to reach some other port. Observe, coming into a port completely armed, he may refit and repair; but being altogether unarmed, he cannot put up a mast or a sail merely to take that vessel across the ocean. I cannot believe that the sound construction of an Act of Parliament passed within fifty years of the present time can by possibility lead to such an amount of inconsistency and absurdity, and I may add injustice, as is involved in the construction which we are asked with so much earnestness to put upon this statute. It seems to me to amount almost to that degree of what is said to be repugnance to common sense which ought, according to the golden rule, to defeat the effect, even if the words conveyed the meaning, which they certainly do not.

In my judgment the Act was not framed in order to make any difference between ships of war, and guns, ammunition, and other implements of war, but to prevent our shores from being made the points of departure of hostile expeditions *commissioned* and *equipped* to commit hostilities against a belligerent not at war with us. The 7th section, therefore, forbids the issuing or delivering a commission as well as equipping in order to commit hostilities; for without a commission any act of hostility would be a clear and undoubted act of piracy, and there was no occasion for a new law against piracy. To suppose that the legislature left to British shipbuilders the power and right

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to *build* ships for war, as before the statute, but that they meant by the words “equip, furnish, and fit up,” to forbid them from sailing away, however harmless and innocent of war their condition might be, is I think an unworthy imputation on the good faith of those who made the law. There can be no doubt they did not mean to permit a ship or vessel to go away *armed*, for they have said so distinctly; but “*arming*” admits of many degrees, and a doubt might arise, if the word “*arm*” alone had been used, what degree of arming would constitute the offence. But the degree is settled and determined by taking the whole sentence: the ship is not to be equipped, &c., in order to cruise or commit hostilities; if the equipment amounts to that the law is broken; if it does not, no offence has been committed.

With respect to the rule, I am of opinion that none of the grounds upon which it was moved ought to prevail, and that the rule ought to be discharged.

BRAMWELL, B.—The law that governs this case is a written law, an act of parliament, which we must apply according to the true meaning of the *words* used in it. We must not extend it to anything not within the natural meaning of those words, but within the mischief or supposed mischief intended to be prevented, nor must we refuse to apply it to what is within that natural meaning, because not or supposed not to be within the mischief.


In this, as in other cases of doubtful meaning, it is legitimate to resolve that doubt by ascertaining the general scope and object of the enactment. And, accordingly, international law has been referred to, certain propositions have been laid down in that necessarily vague science, and it has been argued that the Act was passed merely to enable the Crown to enforce the observance of that law by its subjects, and so it has been sought to find its meaning. But

it is clear to me that the statute prohibits some things which are not, and I strongly incline to think permits some things that are, prohibited by international law. In the result, I concur with the learned Attorney General, that the question which we have to answer cannot be solved by treating the statute as a mere enforcement of international law.

Again, it may be a legitimate mode of determining the meaning of a doubtful document to place those who have to expound it in the situation of those who made it; and so, perhaps, history may be referred to, to shew what facts existed, bringing about a statute, and what matters influenced men's minds when it was made. But we know that in our legislation an argument may be used in support of the principle of a Bill which is consistent with particular provisions of great variety; and we know that in all legislation where it is intended to prohibit a thing, it may be necessary to prohibit others, under colour of doing which the thing intended to be prohibited may be done. This, therefore, affords no certain clue to the meaning of this enactment. Nor would ascertaining the objects of the authors of the American Act, from the provisions of which in our Act there is a purposed difference.

It becomes necessary then minutely to scrutinize the words of our statute, and interpret them with such assistance (if any) as can be got extra its four corners. Now it is no doubt a penal statute, but I think it ought to be construed as laid down by the late Mr. Sedgwick in his Book on Statutory and Constitutional Law. He says, at p. 326, "But the rule that statutes of this class are to be considered strictly, is far from being a rigid or unbending one; or rather, it has in modern times been so modified and explained away, as to mean little more than that penal provisions, like all others, are to be fairly construed according to the legislative intent as expressed in the enactment; the Courts refusing on the

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one hand to extend the punishment to cases which are not clearly embraced in them, and on the other, equally refusing by any mere verbal nicety, forced construction, or equitable interpretation, to exonerate parties plainly within their scope;" a passage in which good sense, force and propriety of language are equally conspicuous; and which is amply borne out by the authorities, English and American, which he cites. And I must here record the well-founded remark of the Attorney General to the effect, that whereas formerly statutes being extended equitably, as it was called, beyond their natural meaning, penal statutes were exempt from such extension; now that such liberties are not taken with statutes, there is no reason for construing penal statutes on such different principles as were formerly applied. Nor, I confess, can I think that the interests of the shipbuilding or any other trade are so concerned in this matter as to afford an argument in favour of the defendant's construction.

I now come to the very words of this much debated section 7. I leave out all which are needless to the matter in hand. I am satisfied that the words "equip, furnish," and "fit out," are not limited to transports and storeships. The rule which interprets "*reddendo singula singulis*," cannot apply here; because all the words "equip, furnish," and "fit out," are sensible in reference to vessels intended to cruise or commit hostilities. The section reads thus: "If any person within any part of the United Kingdom shall equip, furnish, fit out, or arm any ship or vessel with intent or in order that such ship or vessel shall be employed in the service of any foreign prince as a transport or storeship, or with intent to cruise or commit hostilities," &c. Now we have to ascertain the meaning. On the part of the Crown it is said, that if there is an intent that the ship shall be employed in the service of any foreign prince, with intent to cruise or commit hostilities, any equipment with

that intent is sufficient, however unfit to accomplish such intent; that the rigging, victualling, manning, and other parts of equipment are lawful or not according to the intent with which the ship will be used by those for whom they are done. This is said to be according to the very words of the statute. Supposing it to be so, it seems to me that the difficulty is only shifted; that the question remains and becomes this, What is the meaning of the words "with intent or in order that such ship shall be employed in the service of any foreign prince with intent to cruize or commit hostilities?" Does the expression mean with intent or in order that by means of such equipment she may cruize or commit hostilities, that she shall be in a condition for proximate hostilities, so that the port which she leaves will be a "station of hostilities?" or does it mean, as contended by the Crown, that an intent is within the statute, where the equipment is in order that she may be employed in the service of a foreign prince, though further acts on his part are necessary to enable her to cruize or commit hostilities?

I think that this is a correct statement of the question, and it seems to me that it must be answered adversely to the Crown's contention. I think that the fair and natural meaning of the words is, that the equipment must be fit for cruising or the commission of hostilities. The word "intent" before to "cruize or commit hostilities" seems put there on purpose to shew this. But I dislike relying on a single word. Let it then be rejected, and the statute read thus: "If any person shall equip any ship with intent or in order that such ship shall be employed in the service of any foreign prince to cruize or commit hostilities." Now what would be the meaning if the words were, "if any person shall equip any ship with intent or in order that such ship shall cruize or commit hostilities in the service of any foreign prince?" Surely that would require an equipment

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suited for such cruising. Do those words differ from the following: "If any person shall equip any ship with intent or in order that such ship or vessel shall be employed to cruize or commit hostilities in the service of any foreign prince?" And do these latter words differ from those in the statute? I think not. Take Mr. *Mellish's* illustration. If the words were, "equip with intent or in order that the ship shall be employed in the service of a merchant in the whale fishery," could it be said that any equipment or intent would be within the Act, unless the equipment was or was meant to be fit for whaling?

I think that this is the plain, fair, and natural meaning of the words by themselves, but there are collateral considerations to the same effect. Building is not prohibited, selling is not prohibited. I do not agree with Mr. *Mellish* that if the statute does not prohibit building, it must necessarily permit equipping. It is possible that the legislature meant, "You may build, which is harmless unless you equip, and that you may not do." But it seems to me that the omission of "build" and "sell" shews that something beyond a harmless ship and equipment was meant to be prohibited. It may be said that selling an equipped, armed, and manned ship is not prohibited, in words at least, and therefore that no argument can be derived from the omission of "build" and "sell." My answer is that there are no ready-made ships equipped and armed for sale, they are done to order; there was no need therefore to prohibit what never has happened or could happen. Such a prohibition, therefore, would be useless, whereas a prohibition of building and selling would not.

Again Mr. *Karslake's* argument comes in: A man has a ship for sale; he may sell it to a belligerent if he does nothing to it; he may equip it if the buyer means to use it as a packet ship, but the same equipment is unlawful if the *buyer's* intent is different. So that the misdemeanor

is committed or not, according to the intent, not of the equipper, but of his customer. Because, suppose the equipper says, and truly, "I equipped it, that the buyer might do as he pleased with it. I cared not what that was," what intent is there then in the equipper's mind that she shall be employed to cruize? Moreover, the words are, "in order that," &c. Can there be an equipment in order that a vessel may be employed to cruize unless the equipment is calculated to enable her to do so? Again, surely the equipment of a vessel "with intent or in order that such ship "or vessel shall be employed in the service of any foreign prince as a store ship or transport," means an equipment as such, or an intent that such equipment should enable it so to be employed. Read the enactment without the word "employed," and can there be a doubt of the meaning? Does the use of that word make any difference? I think it cannot properly be said that a man does an act with intent, unless he intends the act to bring about the thing intended, or unless the act is particularly fitted to do so. Thus, if a man builds a ship in which *he* means to go on a whaling voyage, he builds with the intent that the ship shall go on a whaling voyage though unfit for whaling; but if he builds her for another, he does not build her with intent that she shall go whaling unless he particularly adapts her to that service. In this case, if "building" with intent that the vessel should be employed to cruize had been forbidden, I think the forfeiture would have been incurred, for by her build she is particularly adapted for that purpose; but the word "equip" is used, and there is no forfeiture unless there is an equipment particularly fitting her for cruising, the equipper himself not intending to cruize in her.

I now come to section 8. This section is relied on by counsel of great ability on each side as being in his favour.

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It seems to me to be strong for the defendants. It, by implication, permits any equipment to a vessel already armed, provided it is not an equipment for war. If the "Alabama," with her armament, could run into an English port, whatever was done to her in this country before, in the way of equipment, could be done now lawfully, and she might sally forth armed and equipped, though it is said the equipment alone was unlawful. It is said that such ship must have been equipped before, but she may have lost her masts, sails, or screw, and according to the argument of the Crown, they may be replaced if she is armed already, but not if she is unarmed. Or she may come here armed, and have her equipment bettered to any extent ; she may have new masts, rigging, sails, boilers, or engines, but any one of these, if she is unarmed, is unlawful.

Further, in section 2, British subjects are prohibited from serving in vessels used, fitted out, or equipped, or intended to be used for any warlike purpose. Surely the vessel in which service is prohibited by this section must be capable of fighting. Again, the title and preamble both shew that the statute was directed against fitting out and arming for warlike purposes and operations. Section 2 is in the same sense.

It is said that this construction requires the vessel to be *armed* to be within the Act, and that so the words "furnish, fit out, and equip" are superfluous. I agree that they are not to be so treated, if it can be avoided, though I strongly incline to think that the person who used them attached no very definite idea to them. In the title it is "fit out or equip," without "arm." In the preamble it is "fit out and equip *and* arm." In section 2 it is "used, fitted out, or equipped, or intended to be used for any warlike purpose." In section 7 the words are "equip, furnish, fit out *or* arm." Surely no precise idea was in the mind of the author of


these varying though similar expressions. The probable intent was to use sufficiently comprehensive words, and to avoid such a question as whether a ship was "armed" strictly speaking, and to make it enough if she was equipped for warlike purposes. Such a case may well be, that the ship, though not armed, is equipped for warlike purposes. By "armed," I suppose it would be meant ordinarily that she had cannon, but if she had a fighting crew, muskets, pistols, powder, shot, cutlasses, and boarding appliances, she might well be said to be equipped for warlike purposes, though not armed.

On these grounds, independently of authority, and on the very words of the Act, I think that the construction contended for by the Crown is wrong, and that that of the defendants, prominently put by Mr. *Mellish*, is right, viz., that the section prohibits that equipment only which is itself such that by means of it the vessel can commit hostilities, and that no equipment which gives no means of attack and defence is within section 7.

It may be said that this is a lawyer's mode of dealing with the question, merely looking at the words. It is so, and I think it right. A Judge, discussing the meaning of a statute in a Court of law, should deal with it as a lawyer and look at its words. If he disregards them and decides according to its makers' supposed intent, he may be substituting his for theirs, and so legislating. As has been excellently said, "Better far be accused of a narrow prejudice for the letter of the law, than set up or sanction vague claims to discard it in favour of some higher interpretation, more consonant with the supposed intentions of the framers or the spirit which ought to have animated them." Important as are the objects of this statute, it must be construed on the same principles as one regulating the merest point of practice or other trifling matter.

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But I am willing, as far as possible, to look beyond the mere words of the enactment, to look at its general scope and intent, and to take what is called a broader view. In my opinion the statute was intended to prevent any of the subjects or territories of this country from being belligerent; to prevent them from being immediately or proximately concerned in hostilities between foreign belligerents. With this object it forbids British subjects to enlist in foreign service for hostile purposes *everywhere*, whether the enlistment is in or out of the Queen's dominions. It forbids every one, whether a subject or not, to enlist persons *within the Queen's dominions*. It forbids the fitting out of vessels of war in *the Queen's dominions* by all persons, whether the Queen's subjects or not. It thus forbids the British subject being a combatant, and the British territory a station of hostilities. It is personal and local to the extent of the Queen's sovereignty. It does not forbid the British subject, if abroad, from fitting out and arming a ship, nor if here from building and peacefully equipping it. Those provisions of the statute which forbid enlistments of British subjects anywhere, go beyond the municipal enforcement of international law, but as far as those of the provisions of section 7, now in question, are concerned, it was intended to prevent the subjects of this realm giving cause of complaint of violation of international law by making the country a station of hostilities. I think that a vessel, departing neither armed nor equipped so as to be capable of attack or defence, is not a violation of international law, be its object what it may. No doubt the equipment of a vessel as a transport is prohibited by this Act, and yet such a vessel is not "equipped for warlike purposes," nor is the port from which she departs a station of hostilities. But, as I have said, I know that in some cases the statute goes beyond the rules of international law; in the provisions in ques-

tion I think it does not. Historically we know how these words, inconsistent with the title and the preamble, were introduced.

Further, if we consider the different matters brought forward to assist us in putting a construction on this act of parliament, they all seem to confirm the opinion which I have expressed. There is no doubt what was the origin of the statute; what was the object immediately in view. It was to prevent the issuing forth of hostile expeditions from British territory. It was not, to judge from its history and the speeches made in reference to it, to prevent the departure from this country of vessels incapable of attack or defence. So of the American statute. Its origin and the object immediately in view are well known. They were the same as in the case of our statute. Nay, we know from American authority that it was intended not to prevent a commerce in vessels of war. But the language of the American statute is decisive. In section 3 the words are "fit out *and* arm." It is true the section proceeds, "or be concerned in furnishing, fitting out, *or* arming;" but clearly that means, be concerned in any part of the whole offence. There must be a fitting out *and* arming for any person to be concerned in either. It is absurd to suppose that the statute should make it an offence to fit out *and* arm, and also an offence, and an equal offence, to be *concerned* in fitting out where there was to be no arming. Besides, the same words apply to each matter, viz., with intent, &c. Further, section 10 of the American statute only applies where the ship is built for warlike purposes, *and* the cargo principally consists of arms and munitions of war, *and* the number of men or other circumstances render it probable that such ship is intended to be employed by the *owner* to commit hostilities, &c. It is clear that the bond to be given under these sections could not be required in the case of

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the "Alexandra" until she was armed or had a cargo principally arms and ammunitions of war.

So, again, if we look at the rights and the obligations created by international law, if a hostile expedition, fitted out by a state, leaves its territory to attack another state, it is war; so, also, if the expedition is fitted out, not by the state, but with its sufferance, by a part of its subjects or strangers within its territories, it is war, at least at the option of the assailed. They would be entitled to say, "Either you can prevent this or you cannot; in the former case it is your act and is war, in the latter case in self-defence we must attack your territory whence this assault on us proceeds." And this is equally true, whether the state assailed is at war or at peace with all the world.

The right, in peace or war, is not to be attacked from the territory of another state, that that territory shall not be the basis of hostilities. But there is no international law forbidding the supply of contraband of war: and an unarmed vessel is, in my judgment, that and nothing more. It may leave the neutral territory under the same conditions as the materials of which it is made might do so. The state interested in stopping it must stop it as it would other contraband of war, viz., on the high seas.

I have hitherto considered the case independently of the authorities. They are exclusively American on the American statutes. I concur in the eulogium(a) which the Attorney General passed on American legislation and American Judges in this matter. An English lawyer must rejoice to see that those who administer in America a law, in great part our common inheritance, administer it on the same fearless and honest principles as those on which I venture to say law is administered here. The way to shew our sense of their example is, not to consider what would be

(a) *Antè*, p. 512, note.

acceptable to their countrymen merely, and decide accordingly, nor to be influenced by the foolish threats which have been uttered, but to decide, as their judges have done, truly and honestly to the best of our ability.

Now there are but three decisions to be noticed. The first is the case of the "Independencia" (a). It has not the slightest bearing on the present case. The "Independencia" was an armed vessel. Being so, she came to Baltimore, and there had her fighting crew increased. Mr. Justice *Story* expressly states, as a fact found, that the Court is driven to the conclusion "that there was an illegal augmentation of the force of the 'Independencia' in our ports by a substantial increase of her crew. This renders it wholly unnecessary to enter into an investigation of the question whether there was not also an illegal increase of her armament." As to the "Altravida," he says there was "an illegal outfit and an enlistment of her crew within our waters for the purposes of war." He decides then on the ground of warlike equipment in the American port. I doubt if Mr. *Jones* was right when he cited this case to shew that it was not an authority against him.

Another case is that before Chief Justice *Marshall* (b). If a precedent of honest and eloquent indignation was wanted, I would refer to his judgment; but the case itself, like the other, has no bearing on the present. The vessel was "completely fitted in our ports for military operations;" she could have fought at the moment of leaving Baltimore. She might have been subject to the penalties of piracy, but she was not the less equipped and armed for war.

The next case is *The United States v. Quincy*. I say, with all respect, that the case was wrongly decided. The

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(a) 7 Wheaton Amer. Rep. 283, cited *anté* as *The Santissima Trinidad*.

(b) *The United States v. Guinet*, Wharton's American State Trials, 93.

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learned Attorney General confessed it. It supposes that a person can assist in doing what nobody is doing or trying to do. It applies a pleading test, which is of very little use in discussing a statute, and doubly misapplies it. First, it is not enough to use the words of a statute in an indictment, where, from their position in the statute, they would have a different meaning to what they would have standing alone. Secondly, the objection is misunderstood. Supposing it taken to the indictment it would be, that the indictment should have said "A. was fitting *and* arming, or attempting to fit *and* arm, and the defendant was assisting to fit." Further, this case does not say that if the principal in the transaction were indicted, anything less than a warlike equipment would suffice; and that is the only question before us.

These authorities, to my mind, if anything, are in support of that view of international law and of the statutes which I have expressed. The history of our statute, the history of the American statute, the duties of international law, and the speeches and acts of jurists and of statesmen, all point to the same conclusion. A like opinion was recently indicated in an important official statement, in which it was said that "England was preventing the departure of hostile expeditions from her shores." This, whether a correct statement in point of fact, I know not; but it is by implication a correct statement of what she is bound to do by international law, and what she has power to do by municipal law.

I am aware of the consequences if this is the law. A ship may sail from a port ready to receive a warlike equipment; that equipment may leave in another vessel, and be transferred to her as soon as the neutral limit is passed, or at some not remote port, and thus the spirit of international law may be violated, and the letter and spirit of the municipal Act evaded. But as the law stands, or as both laws

stand, I see no remedy. I do not see what line can be drawn but the sharp line which Sir *Hugh Cairns* stated. If it is unlawful to put a peaceful equipment on a ship, because at three miles from the neutral territory she is meant to receive a warlike equipment, why is it not unlawful if the distance is to be a thousand miles, or in this case one of the Southern ports? If she may not sail peacefully equipped to a Southern port, why would it be lawful to send there her parts ready to be put together? If not those, why the materials of which they could be made, and so on? I am aware, of course, that it would be easy to draw a line and make a law prohibiting the sending forth of a ship, and permitting the exportation of its parts, leaving that to be dealt with as contraband of war, and that such a law would make a broader distinction between what would and what would not be lawful than now exists, and that its evasion by sending forth the parts of a ship would be more difficult and less hurtful and irritating to the opposing belligerent. Whether such a law would be desirable I do not presume to suggest. What I wish is to shew that in considering this as a matter of principle, I have borne in mind, first, that the present law is capable of easy and mischievous evasion; and secondly, that if it is sought to extend it by construction, it is impossible to stop short of the prohibition of the export of contraband of war generally; though, thirdly, a positive law so stopping would not be difficult of enactment.

An argument which I have partly dealt with already has been used (not indeed before us), that there may be an attempting or assisting by persons who do not commit the complete offence of equipping or arming. So there may; but there can only be an attempt to commit an offence where, if the attempt succeeded, the offence would be committed. A person can only assist in doing an act where the act is to be done. Now, there is one thing in this section clear

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beyond doubt, viz., that there can be no offence against it unless that offence is committed within the Queen's dominions; that therefore, no one can attempt contrary to the provisions of this Act, unless the equipment attempted be meant to be done in the Queen's dominions; and that no one can assist contrary to those provisions, unless some one is equipping or attempting to equip within the Queen's dominions. This was admitted by the Attorney General, and indeed is to my mind too plain for argument.

Taking this view of the statute, I think that a right direction to the jury would be, If you are satisfied that the parties concerned were equipping or arming, or attempting to do so, the ship claimed, with intent that it should be employed in the service of a foreign prince to cruise or commit hostilities against others as alleged, find for the Crown; but such equipment or attempted equipment must be of a warlike character, so that by means of it she is in a condition more or less effective to cruise or commit hostilities; otherwise find for the claimant.

Holding this opinion, I think that the direction of the Lord Chief Baron was substantially, if not verbally, correct. Still, in considering whether the jury came to a wrong conclusion, whether the verdict was against evidence or otherwise unsatisfactory, all that his Lordship said must be taken into account, and though the proceeding is penal, if there had been any evidence on which the jury could have acted I should have thought that there ought to be a new trial, considering that the defendants kept out of the box witnesses who must have known what the truth was. But interpreting the statute as I do, I think that the verdict was right. I have no doubt that the vessel was building and equipping for the Confederates, and in order that they might use her, when armed and equipped for hostilities, against the Federals. This was being attempted, but I see no evidence that it was intended to arm or equip her in

the Queen's dominions so as to be capable of attack or defence. On the contrary, I believe it was intended to evade, not infringe, the statute, not to commit a misdemeanor, nor to do or attempt to do what would cause a forfeiture of the ship. I believe on the evidence that it was intended to deal with this vessel as with the "Alabama," namely, to get her out of the country, and give her her warlike equipment and armament out of the Queen's dominions. It is worthy of remark that the information does not suggest that it was intended to arm her here. I think, therefore, that this other ground for a new trial fails, and that the direction was right, and that on a right direction the verdict for the defendants was right on the evidence, and consequently that the rule should be discharged.

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CHANNELL, B.—This was an information filed by her Majesty's Attorney General, insisting upon the forfeiture of a ship called the "Alexandra" under the provisions of the 7th section of the Foreign Enlistment Act.

That section makes certain acts done with respect to a ship misdemeanors. It then proceeds to say "that every such ship or vessel shall be forfeited and may be seized," as therein provided for.

In the present case a seizure has been made, and this seizure had to be justified by the Crown at the trial of the information before the learned Lord Chief Baron. Upon that trial a verdict was given for the defendants, and the learned Attorney General in last Term obtained a rule nisi for a new trial upon five grounds.

Those five grounds may be ranged under two heads, viz., those of misdirection, and of the verdict being against the evidence.

The question as to the verdict being against the evidence necessarily depends in some degree upon the question



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whether there was misdirection or not, because we must see clearly what were the questions which the jury had to decide, before we can apply the evidence and see whether it supports the finding of the jury. The consideration of the evidence would, therefore, whatever view I were to take on the question of misdirection, come more appropriately after than before the consideration of the construction of the statute. But it will be unnecessary for me further to revert to the question of the verdict being against evidence, in the view which, after much anxious consideration, I feel compelled to take of the construction of the statute, and of the effect of the Lord Chief Baron's direction ; a view which differs in some respects from the opinions of the Lord Chief Baron and of my brother *Bramwell*, and leads me to a different conclusion to that at which they have arrived, and which, for that reason, and on account of the great respect which I always have for their opinions, I express with the utmost diffidence.

Now, under the head of misdirection, I include an inadequate direction, and also a direction which, though right in the main, would be calculated to mislead a jury. Where the question turns upon the construction of an act of parliament, the judge is, I think, called upon to explain to the jury the sense in which any doubtful word or expression in the Act is to be understood. (See *Elliott v. The South Devon Railway Company*, 2nd Exchequer Reports, p. 725.)

In the consideration of the question of misdirection, it will be convenient, first, to endeavour to construe the Act and see what direction ought to have been given, and then to consider whether the direction given agrees in substance with what ought to have been given.

The Foreign Enlistment Act, particularly the 7th section, is very imperfectly worded. There is no doubt that it was in a great measure, but with what appears to me to be important variations, penned from an Act of the United

States passed in Congress, first in the year 1794, and re-enacted by Congress in the year 1818.

This circumstance has given rise to a great deal of argument on both sides. Sir *Hugh Cairns* has suggested, apart from the language of the Acts of Congress, certain *à priori* views tending to shew why the American Act was passed and altered; and then, treating the Acts of Congress as with some exceptions identical with our own, he seeks to apply certain decisions in the Courts of America to the consideration and construction of our own statute. Into this very wide field of inquiry he has constrained the counsel for the Crown to follow him, and they have done so in the very order in which his argument was addressed to us. I do not say that any time was lost, or that in the course of the very long argument that was addressed to us any view was submitted not calculated to assist the Court; but, having carefully considered the arguments, I cannot help thinking that the decision of this most important question should proceed on grounds less wide than those to which the attention of the Court has been so ably called.

Faulty and imperfect as may be the wording of the 7th section of the Foreign Enlistment Act (and more imperfect or faulty wording I can scarcely conceive), if, notwithstanding all this, the words of the 7th section read with reference to the other part of the Act do, by a reasonably fair interpretation of our statute and the evidence, embrace the case of the "*Alexandra*," then in my judgment it scarcely becomes necessary to consider what have been the decisions of the Courts in America upon Acts of Congress in the main much the same, but, in not unimportant respects, different from our own Act.

Whether for the present purpose the Foreign Enlistment Act is to be considered as a penal statute, the Crown in

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this case proceeding for a forfeiture of the ship, or is to be considered as an Act for the first time creating a criminal offence, the rule to be applied in order to its construction is that which is so well expressed in the passage from the late Mr. Sedgwick's Treatise, quoted by my brother *Bramwell* (a), and to which passage I need not advert in detail; but I may say that it deserves, in my judgment, the high eulogium which my brother *Bramwell* has passed upon it, and is, I think, in perfect accordance with the American and English authorities which that late learned writer has cited in support of his view.

Now, faulty and imperfect as the wording of our statute, particularly the 7th section, is, there are certain matters clear enough, in my judgment, to be beyond all reasonable doubt. First, the statute is not a statute passed either merely to define what shall be an offence, or to create an offence for the first time and to define its punishment, but it is in its express intent an Act aimed at the prevention of the offence, not at punishment merely. It is, therefore, in every sense, a remedial statute. And secondly, it is a statute intended to remedy a mischief, which, though forcibly expressed, is only contingent and *possible*, and not *certain*. The language of the preamble points to certain acts which *may* be prejudicial to and *tend* to endanger the peace and welfare of the kingdom; and further, it goes on to recite that the laws in force are not sufficiently effectual for preventing the same. The statute has not, therefore, for its object solely the prevention of acts which, if done, *must* endanger the peace of the kingdom, but appears from the preamble to be aimed also at acts which *may* possibly excite such feelings in other nations as will have that effect. This inclines me to think that the equipment of ships to be

(a) *Antè*, p. 531.

employed at a future time for war, though not so complete in this country that the ship shall be at once able to commit hostilities, may be within the Act.

I do not, of course, come to any conclusion from the preamble alone that such an equipment is prohibited; what we have to look at are the enacting words, but I think that the preamble is, as Lord *Coke* calls it, a key to unlock the meaning of the Act where it is doubtfully expressed; and I concur in the decisions which determine that the words of an enacting clause shall not be cut down or restricted by the preamble.

So that if the case which I have mentioned were clearly within the words of the 7th section, but not within the mischief as declared by the preamble, I should hold that it was prohibited by the Act. As my brother *Bramwell* has remarked, the legislature often finds it necessary, in order to restrain certain acts, to prohibit other acts under colour of which the acts to be restrained may be done.

Now this Act has clearly two distinct and several objects in view. The first is the enlisting or engagement without licence of British subjects to serve in foreign service. There I agree that the statute extends to the whole world, provided the persons enlisting or engaging are British subjects. The second object is, the fitting out or equipping in British dominions of vessels for warlike purposes. The part of the Act which relates to the second of these objects includes all persons, whether British subjects or not, provided the offence prohibited by the Act is committed within the Queen's dominions.

I am not insensible to the value of the arguments which have been addressed to us by the counsel for the claimants, founded on these different objects. These arguments raise one of the many difficulties in the case. They do not, however, seriously affect my view as to the conclusion to which

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we ought to arrive. Prohibition and prevention of a mischief which may be prejudicial to and tend to endanger the peace and welfare of the kingdom were, as I have said, aimed at by the statute. By municipal law every one, whether a British subject or not, being within the dominions of our Sovereign, and claiming the protection of the Government of this country, may be bound. Out of her dominions the municipal law of this country can only bind the subjects of the realm.

We ought not to lose sight of the first object contemplated by the Act and provided for by the first six sections. But it is the part of the Act which relates to the second object that principally requires our attention. That last part of the Act, beginning at the 7th section, does by that section provide against equipping vessels with a certain intent, issuing or delivering any commissions for ships with the intent therein mentioned, and lastly for the forfeiture of the ship or vessel. I have said that the forfeiture clause following the clause creating certain misdemeanors applies to "every such ship." This is certainly rather clumsily expressed, but we must take it that every ship is forfeited with respect to which any of these misdemeanors have been committed.

We have, therefore, to see what are the misdemeanors created. They are, first, equipping, fitting out, furnishing, or arming a ship with a certain intent or purpose. Secondly, attempting or endeavouring to equip, &c., with the same intent. Thirdly, procuring to be equipped, &c., with that intent; and fourthly, aiding, assisting, or being concerned in equipping, &c., with that intent.

Now it is, I believe, the unanimous opinion of the Court, that the second, third, and fourth of the offences here spoken of mean respectively the attempting, the procuring, and the assisting in such an equipment as is spoken of in

the first, that is to say, that the secondary offences, as they have been called, are the attempting, &c., such an equipment as if completed would amount to the principal offence. If, therefore, we can arrive at any clear conclusion as to what is the principal offence, the question whether there was any attempt &c. to commit that offence becomes a mere question of evidence. This being clearly understood, we may, for the purpose of construing the Act, disregard all the words about attempting, &c., and aiding, and being concerned in, and so on.

We have, therefore, now reduced the main question in the case to this, What did the legislature mean by the words "equip, furnish, fit out, or arm a vessel with intent, or in order that she should be employed in the service of a foreign power as a transport or store ship, or with intent to cruise or commit hostilities against a power with whom we are not at war?" Arming is not charged in the present information; we may therefore leave out the words "or arm." The words "transport or store ship" are also immaterial, now that the 97th and 98th counts charging the "Alexandra" to be a transport or store ship are abandoned, except, always, that we must adopt such an interpretation of the words common to both clauses as they would be capable of bearing when combined with the words "as a transport" as well as when combined with the words "with intent to cruise."

The words, "equip," "fit out," and "furnish" seem to me to mean nearly the same thing. Throughout the whole course of the argument in this case, little stress was laid upon any supposed difference between the words "equip" "fit out," and "furnish." We may, therefore, still further reduce the words which we have to construe to these, "equip with intent or in order that the vessel shall be employed

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in the service of a foreign power with intent to cruize or commit hostilities.”

It is admitted, I think, on all sides that these are the words upon which the main question in the case turns. Now it is clear that the offence created by these words is one consisting of an act done with a certain intent or purpose. The act and the intent must both be present to constitute the offence, and the act must be done and the intent must exist within the Queen's dominions.

It is also, I think, agreed on both sides that the intent spoken of must be the intent of some person who has control over the vessel so as to be able to carry out his intent or purpose.

We now come to the points on which there is a difference of opinion. The Attorney General contends that any equipment, however peaceful in its nature, will be an offence against the Act, provided there is an intent that the vessel shall be used at some future time in the service of a belligerent. He admits that where the equipment is clearly peaceful, there will be much greater difficulty in proving the intent, but he says that, assuming that you can prove the intent, then any kind of equipment will be within the case contemplated by the Act.

On the other hand, the counsel for the claimants connect more closely the act and the intent, that is to say, they explain the general word “equip” by the subsequent words “with intent or in order that the ship shall be employed” in a given manner, and they say that these words shew that the equipment spoken of is an equipment suitable to the employment. Further, I understand them to go the length of saying that it must be suitable only for that employment.

It is remarkable that the words “or in order that” are

not in the American Act, but have been added in ours. This will be a subject for remark by-and-by when we come to consider the applicability of the American cases. Now we have only to see what difference these words make. Do they enlarge the scope of the Act by mentioning another case, another kind of equipment which is also within the Act, which in the course of the argument I was much disposed to think was the right view, or do they rather restrict the previous words, explaining them and throwing a light upon them, as suggested by Mr. *Mellish*? It seems to me now that the latter view is the right one, and that the words "or in order that" restrict and explain what is meant by "with intent" rather than include any new case not before included. If I do an act which is entirely immaterial to the employment of the ship, as painting her name on her stern, I may do that having all the time the *intent* that she shall be employed in a given manner, but I cannot do it *in order that* she may be so employed, for it has no reference or relation whatever to her employment, and does not further her being employed in one way more than another.

Thus, there may be an equipment "with intent that," which is not an equipment "in order that." But can there be an equipment "in order that," which is not "with intent that?"


The Attorney General has suggested that there *may*, or at all events that the framers of the Act thought there might. He argues that the words were inserted to meet the argument that builders and other tradesmen are not parties to the intent: but, he says, at all events they may be said to do it "in order that." But it is clear that a man can do an act *in order that* a result may follow, without intending that result. Does not every man intend to effect the object of his act? If, however, we do suppose such a case, where a man without having the

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intent that the ship shall be employed in a given manner, yet equips her in order that she may be so employed, is not the inference as strong as possible that the equipment must in that case be of a nature suitable and appropriate for that employment? It seems then that if we are to give any force to the words "in order that," it must be as explaining and illustrating the words "with intent that."

It may also be remarked that in this information the charge is that certain persons did equip the "Alexandra" with intent and "in order that," &c. This shews that whoever drew the information supposed the two expressions to mean the same thing. I do not attach much importance to the last remark, for if we ought to decide them to be different, then I think the words "and in order" in the information might be rejected as surplusage.

It seems, then, on the whole, that in order to justify the seizure the Crown must shew an equipment (either completed or attempted) of the "Alexandra," *in order that* she might be employed, &c.; and further, that this necessarily means an equipment enabling, or tending to enable, her to be so employed. This last conclusion I draw also from the nature of the words "equip, furnish, and fit out."

I do not adopt the idea that any one of these words can include building. The Attorney General at one time seemed disposed to contend that fitting out might include building. I do not think that he adhered to that throughout. If he still holds that opinion, I certainly differ from him upon the point. I do not pretend to say whether any particular act, as for instance fixing the ship's bulwark, is part of the building or part of the equipping and fitting out. That, I think, might be a question for the jury. I do not even say that acts done to the structure of the vessel may not be equipments. I should say that you were equipping a ship for an Arctic expedition by strengthening her framework in order

to enable it to resist the pressure of the ice. But, I say that equipping, fitting out, and furnishing are all acts subsequent in their nature to the building, and in speaking of which you contemplate the ship as already in existence.

I think there is nothing contradictory to this view in the cases cited by the Attorney General, viz., *The United States v. Guinet* in Wharton's State Trials, the *Ship Brothers*, and the *Ship Mermaid*, both in Bee's Reports.

What it seems to me that these words "equip, furnish, or fit out" do all signify is this,—contemplating the subject-matter of the equipment as already in existence, they express an idea of preparing it for some purpose or another. That purpose may be either expressed or implied. When you speak of "equipping a ship" *simpliciter*, it may be that that means getting her ready for sea, because to go to sea is the natural and ordinary use to which a ship is put. If you state the nature of her employment, then equipping means getting her ready for that employment. I interpret the words, therefore, as shewing that the equipment spoken of in the 7th section must, as a matter of fact, be an equipment for the employment spoken of.

If we are left in doubt whether this is the right interpretation or not, I think, as I have said before, that we may and ought to look at the preamble to see the object of the Act. There we find that the mischief to be remedied is one which may arise from the fitting out and equipping and arming of vessels for warlike operations. This then is the very case which I have interpreted the 7th section to strike at, provided that the employment there mentioned is an employment for warlike operations. What is the employment there mentioned? "Shall be employed in the service of a foreign prince with intent to cruize or commit hostilities." It has been assumed in the argument on both sides that this may be read as if the words "with intent" were.

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there omitted, as they are in the American Act. Whether this is right or not, their insertion certainly causes great confusion. In the first place it provokes comparison with the other clause commencing with "with intent," causing one at first sight to read them as shewing alternative intents, either of which would, with the requisite act, constitute the offence. This, on looking into it, is agreed on all sides not to be the right construction. But they create a further difficulty. This intent now spoken of is necessarily, from the collocation of the words "*shall be employed with intent,*" an intent of the employer, and not of the equipper, which is, as it were, engrafted upon the intent of the equipper; and it is very difficult to see how one man can intend that another man shall intend something or other. It is probably this difficulty which has prevented the counsel on either side from founding any argument upon these words. But for this, I should have thought it might have been argued that an employment with intent to cruise differed from an employment to cruise in this, that it might include an earlier employment, and might cover the voyage in an unarmed state from one port to some port where the vessel was to be armed, and from which she was to start to cruise. But even if I adopt the view taken by the Attorney General that an employment with intent to cruise may be construed the same as an employment to cruise, I think that an equipping, in order that the vessel may be employed to cruise or commit hostilities, means an equipping for warlike purposes. So far then, I think, it is clear that there must be an equipment for war, and that an equipment which cannot be used, and is not useful for war, will not do. The conclusion at which I have so far arrived is drawn from the 7th section, with such light as is thrown upon it by the preamble and by the 2nd and 8th sections. In drawing that conclusion I agree

in a great measure with the argument of the claimants, and with the judgment of the Lord Chief Baron and my brother *Bramwell*.

But another, and to my mind, very important and difficult question arises. Suppose that there is evidence of some equipment or other, either completed or attempted, but that the equipment does not in itself shew whether it is an equipment for war or not, may we take into consideration evidence of the intent to prove that it is actually and in point of fact an equipment for war? Upon this question, after much anxious consideration I have arrived at the conclusion that we may. I do so with the most sincere and respectful deference to the opinions of the Lord Chief Baron and my brother *Bramwell*, and with great distrust as to the correctness of my own judgment.

It will be convenient, now that I am about to consider whether the character of the equipment, where doubtful, may be explained by the intent of the parties, to see what effect the clause "as a transport or store ship" has upon the interpretation of the section, because it is especially in the case of a store ship that we see the absolute necessity of explaining the character of the equipment by the intent. Now is there anything which militates against the view, that the equipment with intent or in order that the ship may be employed in a given manner, means an equipment suitable to that employment, in the fact that one of the employments spoken of is "as a transport or store ship?" It may well be that there is no equipment specially suited to a store ship. All equipments of an ordinary merchant vessel may be, and probably are, suitable to a store ship. But is it any reason for saying that the equipments struck at by the Act are not equipments suitable for a store ship, because being so they would be also equipments for another object? Is a gun the less an equipment for war because it may be used for firing salutes?

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But the counsel for the Crown deduce from the case of the store ship, as it seems to me, a very important argument; they say that in that case the jury must necessarily look at the evidence of the intent to enable them to say whether the equipments are for a store ship or not; and if so, why are they not to look at the evidence of intent to say whether certain equipments of a doubtful nature are for warlike purposes or not. I grant at once that they may, provided that the equipments as to which the doubt exists are such as can be directly used for war without further addition. They might of course, if they were in doubt as to whether a gun was an equipment for war, look at the evidence of intent to satisfy themselves that it was not intended to be used simply for firing salutes. But the question is more difficult, supposing that the equipments are such as can only be used for war by some addition being made to them. Suppose a jury to find as a matter of fact that a certain vessel is intended to be sent to the West Indies, and then to have guns put on board,—that when her guns are on board, the mainsail with which she has been equipped in Liverpool may assist her in chasing an enemy's vessel; are they then justified in deducing from that, that the mainsail is an equipment in order that she may be employed to cruize? I have, after giving the question my best consideration, come to the conclusion that the jury may so reason. I am supposing a case where an equipment is made which, though not in itself sufficient to make the vessel a war vessel, is still a necessary part of the equipment of a war vessel. It would, as it strikes me, be a question for the jury to consider whether the equipments are in fact equipments for war; and they may decide that question for themselves by the nature of the equipments if they sufficiently shew it (in which case they will have to look to the intent and purpose only so far as to see that the vessel is to be employed against a power with whom we are

at peace), or they may decide that certain equipments which are capable of being used for war are as a matter of fact equipments for war, on the ground of evidence being laid before them shewing an intent so to use them. But if a jury found specially these facts, that A. B. had equipped a vessel which was in its structure capable of being converted into a war vessel to the extent merely of enabling it to sail away from this country; that he knew that the purchaser intended to convert it into a war vessel; but if the jury also distinctly found that what A. B. did to it was done not in order to convert it into a war vessel, or in order to be useful to it when so converted, but simply in order to enable it to reach a port where the purchaser might, if he pleased, convert it; in such a case I do not mean to say that A. B. ought to be convicted of a misdemeanor under this Act. That case would not, I think, be within the Act, because the jury would there in effect find that the intent with which the act was done was a different one from that mentioned in this section. So far then as to what may be called the principal offence.

There remains for consideration the "attempting" and the "aiding and being concerned in," &c. I have said that the attempt must be to do the act which has been made an offence by the previous clause. The equipment attempted must therefore be an equipment in this country, and of the nature which I have described. In this, the counsel on both sides, and all the members of the Court are agreed. Where an attempt is charged, we contemplate an equipment commenced but interrupted. In that case the jury will certainly have still more difficulty in seeing whether the equipment is an equipment for war, but in my judgment they may so find upon evidence not of the nature of the equipment but of the intent of the parties, provided always that the nature of the equipment so far as it appears is such that it *can* be employed for warlike purposes. The same

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rule applies to the assisting and being concerned in equipping. It must, in the opinion of the jury, be an equipment for war, but I think that their opinion may be formed either from the nature of the equipment or from the intent.

Having arrived at this construction of our statute, I will refer shortly to the cases cited from the American reports, for the purpose for which, and for which only, I think they ought to be noticed, that is, to see whether there is anything in the opinions of the learned Judges of that country, for whose opinions I have the greatest respect, which were delivered in cases to some extent *in pari materia* with the present, which ought to make me pause or review the interpretation I have adopted on looking at the words of our own statute. The cases cited are the cases on the point of what the meaning of equipment is, to which I have already referred; and besides these there are the cases of *The United States v. Quincy* in 6th Peters, and *The United States v. Gooding* in 12th Wheaton's Supreme Court Reports.

In *Quincy's case* the portion of the decision which is material in our case was this; that it was not necessary that the jury should find that the vessel when she left the United States was armed, or in a condition to commit hostilities, in order to find the defendant guilty. The Court do not say that she need not be equipped for war, but only that she need not be completely equipped. This view then coincides with the view which I have taken of our Act. It may be that some of the other points decided in that case are not very intelligibly reported, or even not accurately decided, but, at any rate, there is nothing decided but what is in accordance with my interpretation of our Act. Even if there had been, I think that the insertion of the words "in order that" in the English Act, words to which I attach a certain importance, and which are not found in the American Act, and the omission in the English Act of any words corresponding with the 10th and 11th sections of the American

Act, might cause me to hesitate before acting on the authority of that case. I think that the 10th and 11th sections in the American Act tend to shew that the 3rd section in that Act is less restrictive than the 7th section of our own.

*The United States v. Gooding* was the case of a supposed slaver. The statute, on the construction of which the case turned, was very similar to the Act which we are considering. It was held in the case that it was "an act combined with an intent, and not either separately, which was punishable." It was decided that the equipment need not be a complete equipment, but that a partial equipment was sufficient. There are also words in the decision which would seem to shew that the equipment must be an equipment for the purpose of a slave voyage, as a matter of fact, though it might be only a partial one. It is said, "Whether the fitting out be fully adequate for the purposes of a slave voyage may, as matter of presumption, be more or less conclusive, but if the intent of the fitment be to carry on a slave voyage, and the vessel depart on the voyage, and her fitting out is complete as far as the parties deem it necessary for their object, then the statute reaches the case." That seems to me to amount to this, that there must be a fitting out in point of fact for a slave voyage, but either the intent or the nature of the fitting may determine whether it was for that purpose. This agrees with the conclusion to which I have arrived.

I now proceed to consider what questions ought to have been left to the jury. Disregarding any question as to the proper style of the Confederate States, which is no doubt sufficiently laid in the information, the questions, if my views as before explained be right, should have been, 1st. Was there an intent on the part of any one having a controlling power over the "Alexandra," that she should be employed in the service of the Confederate States to cruize or commit hostilities against the United States? 2nd. If so,

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possibly he may *build* a ship, but he may not equip it in order that it may be employed for war. Now if the Lord Chief Baron is to be understood as saying that a man may make to order the same kind of vessel as he may sell when he has it ready, that is to say, a vessel equipped and armed, then such a direction in my opinion would be erroneous; and I cannot help thinking that a jury would understand the Lord Chief Baron to mean that.

Again, the Lord Chief Baron said that he would not leave to the jury the question of what service the vessel was intended for. This I think should have been put. It may be that the Lord Chief Baron thought, not that it did not arise or become material in any event, but that it might be assumed in favour of the Crown as the facts were in evidence, for he proceeded to say that the question was whether the vessel was built or in the course of building. If the jury thought, as the Lord Chief Baron seems to have thought, that the ship was not completely built, and therefore no equipment or fitting out could have been even commenced, the question of intent would not arise. But that was a question for the jury; and it was only in the event of their finding that question in one way, that the question of the service for which the vessel was intended became immaterial.

Further, it is complained that the Lord Chief Baron directed the jury that equipping, fitting out, and furnishing all meant the same as arming. This we now understand him to say he did not do, but only expressed his opinion that they did.

It is clear, however, that the learned Lord Chief Baron did not direct the attention of the jury to the point whether there was an equipment (completed or attempted) of a character doubtful in itself, but still capable of being used for war, which was to their satisfaction established to be an

equipment for war by the evidence of the intent of the parties. And this, I think, should have been left.

I adopt the proposition stated by the counsel for the Crown, that a summing up which, fairly considered, has on the whole a tendency to mislead a jury upon a question of law, on which they ought to be guided by the opinion of the Judge and not to form their own opinion, is open to the objection of misdirection.

As was remarked by the Attorney General in his able argument, the learned Lord Chief Baron was obliged to deal on the trial with a difficult subject, and, as was said by the Attorney General, it is not wonderful if in some things his Lordship may have omitted to have made observations which he would have made, or may have made observations which he would not have made, had it been otherwise. Yet I am not prepared to say that I find in the summing-up of the Lord Chief Baron, delivered as it was under these circumstances of difficulty, any statement of law which is in my judgment absolutely erroneous. But it does seem to me that the explanation given of an extremely difficult and obscure act of parliament was not so full or so clear as a jury ought to have had in a case of so great importance, and certainly not so full as the jury will have if a new trial is granted, now that the whole subject has been so amply and so ably discussed. I think also that there are expressions in the summing-up which a jury would probably have misunderstood; so that, on the whole, I think we ought to grant a new trial on the ground of misdirection, including, as I do in that term inadequate direction, and expressions calculated to mislead the jury.

Taking this view, I need not revert to the question whether the verdict was against the evidence; or whether, supposing it to be so, the present case ought to be assimilated to a penal action, in which case the rule is that a new

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trial is never granted *solely* on the ground that the verdict is against the evidence. I expressly refrain from offering any opinion whether the verdict found by the jury in this case was or was not in my judgment the right one. But I say that it was an unsatisfactory verdict, because it may have proceeded upon a misapprehension of the law and of the questions to be decided.

It is a satisfaction to me to find that my Brother *Pigott* has arrived, in the result, at the same conclusion with myself, although his reasons for doing so may not be entirely the same as my own. It is also a satisfaction to me to know that although I differ from the Lord Chief Baron and my Brother *Bramwell* in the result, there are many broad points of agreement between us. I agree with them in thinking that what this statute forbids is an equipment for war. I agree with them in thinking that the main object of the statute was to prevent our ports being made stations of hostilities. Our difference appears to be this, that they think the equipment must be intended to be completed so that the vessel when it leaves our port shall be in a condition at once to commit hostilities; whilst it seems to me that in the fair and reasonable meaning of the words used, another case is included, viz., where the equipment not being complete to that extent is yet capable of being used for war, and the intent is clear that it is to be used for war. I say that the fair and reasonable meaning of the words includes that case, and that we should judicially construe the Act to include it.

It may be said that the manner in which I have considered this case, by a minute scrutiny of the words of the Act, is a mere lawyer's method of viewing the matter—that in a case of this kind it is our duty to take a broader view—to take into our consideration the principles of international law, the duties of nation to nation, and even the

opinions of great statesmen on those duties. I, for my part, have no ambition to decide cases in this Court in any other capacity than that of a lawyer. In days long past judges, I think, often invaded what we now consider the sole province of the legislature. They interpreted statutes to include cases which they assumed to think ought to have been included; thus not merely constituting themselves legislators, but generally also legislators *ex post facto*. That I think will never be done again. As long as acts of parliament are drawn as they are now, the office of construing them will be no sinecure, though we have but to interpret the law and not to make it. If it is for the interest of the nation that the law should be other than we interpret it,—if our construction of this act of parliament may endanger the peace of the nation,—then I say that it may be the duty of Parliament to enact a new law; but it is not our duty to look elsewhere than at the present statute for an interpretation of it.

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PICOTT, B.—The rule for a new trial in this case has been drawn up on seven different grounds. We have, however, to consider them as practically reduced to two, and accordingly the arguments were directed to impeach the general verdict which was found for the claimants of the ship, the “Alexandra,” first, upon the ground that the Lord Chief Baron had misdirected, or had insufficiently directed the jury in point of law, and, secondly, that the verdict was against the weight of evidence.

The material facts disclosed in evidence on the trial were, that the vessel, the “Alexandra,” was built by Messrs. Miller, who stated that she was for Messrs. Fraser, Trenholm and Co., agents of the Southern Confederacy; that she was launched in March, and at the time of the seizure, on the 5th of April, the defendants’ workmen

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were variously engaged in fitting her with stanchions for hammock nettings; that her three masts were up, and had lightning conductors on them; that she was provided with a cooking apparatus sufficient for 150 or 200 people; that her build was apparently for a gun-boat with low bulwarks, over which pivot guns could play; and her hatches were too small for merchandise; in fact, that she was not qualified for mercantile purposes. No evidence was called for the defence. The contention upon the trial, as upon the argument before us, was that upon the true construction of the 7th section of the statute, the Foreign Enlistment Act, the evidence disclosed no illegal act done or attempted in reference to this vessel which worked its forfeiture.

The Lord Chief Baron's direction to the jury is before us at full length, and I proceed to consider the objection to its sufficiency, and the arguments which were addressed to the Court thereupon. It is clear that the construction of a statute is for the Judge, and there are no doubt many statutes which are so unambiguous in their language that it is quite sufficient to read the words to the jury without explanation or comment. A Judge has a right to assume that the jury whom he is directing are persons of ordinary intelligence, and in his direction to them to treat them as such. But there are a variety of statutes of quite a different character, and which persons of intelligence not accustomed to the consideration of the artificial language in which Acts of Parliament are frequently framed, require to have fully and carefully explained. In such cases the duty lies upon the Judge to give the necessary explanation, and to evolve the question of fact which the jury are to decide. The statute in question is, in my opinion, clearly one of this class, and we have to see whether, upon the whole, the jury were sufficiently directed on the true meaning of the 7th section of the Enlistment Act, so that they would clearly

understand the issues of fact which they had to try. In order to determine this it is necessary to ascertain the construction which the 7th section ought to bear, and I propose to examine the arguments which were addressed to the Court to guide us in our decision.

As to one class of these arguments, I felt great doubt whether they could be legitimately addressed to us for the purpose of expounding a municipal statute; and certainly I do not consider myself at liberty to look upon them in any other light, except as matters of history as to the state of our law at the date of this statute. I allude to the debates in Parliament, the correspondence of English and American Ministers of State, Mr. Hamilton's Rules of 1793, and the writings of modern historians.

But a second class of argument was founded on the state of international obligations as between neutral and belligerent nations, and which it was argued the legislature, by the 7th section, intended to enforce upon the subjects of the Crown.

This argument necessarily embraced a very wide field, and no doubt those obligations are the foundation of this legislation, but, in my opinion, they are pushed too far, if urged as the necessary limit of a municipal enactment. A belligerent would have no right to complain of a neutral state so long as it is not affected by hostile acts, or until aid be in some way actually afforded to its adversary; but the neutral state as between itself and its own subjects may find it expedient so to legislate that between the attempt to commit acts of hostility and the completion of them by their subjects, an opportunity would be afforded to arrest such completion; and where the object is a prevention of mischief, on which the peace of the country is supposed to depend, I should expect *à priori* that such would be the course adopted. Be this as it may, the consideration of the

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subject can for the present purpose be serviceable at the utmost where the language employed in legislation is in itself really ambiguous, and I think that it cannot be carried to the extent of creating an ambiguity which does not otherwise appear. It is not necessary for me to determine whether this branch of argument is otherwise well founded by a comparison of international obligations with the actual provisions of the Act, for it is admitted that, to some extent, the latter go beyond them.

A third head of argument was founded by both sides on the language and provisions of the American statute. Doubtless it had the same general object, is framed *in pari materia*, and was the forerunner of our statute. In these circumstances I see no objection to making a comparison of the language of the two, and seeing whether by their marked agreement or variance any doubtful meaning of the English legislature can be more certainly ascertained. And in the same way the authorities of the American Courts may serve to guide, though not to govern, our judgments. Now with reference to the corresponding section of the American Act, as compared with the 7th section of the English statute, it is impossible, on the most cursory glance, not to perceive that, although the former was (judging by the similarity of language) taken as the model of the latter, yet that our legislature has made very material variations from it. Of these the very prominent ones are the use in the English statute of the disjunctive for the conjunctive, the extending of the prohibition to equipping transports or store ships, the addition of the words "or in order," to "with intent," and the omission in the forfeiture clause of the materials for building the ship,—alterations which can only have been made with some object at least.

As regards the American authorities, the case of *The United States v. Quincy*, in 6th Peters' Reports, is most relied on by the Crown. The decision must be admitted to be open to some criticism. There was in that case certainly evidence of hostile preparations, and neither of the questions answered by the Court is exactly in point. But it does nevertheless appear from several parts of the judgment that the Court would, if necessary, have gone the length of holding, as, indeed, they say in terms, "that the offence consists principally in the intention with which the preparations were made;" and again, "It is the material point on which the legality or criminality of the act must turn, and decides whether the adventure is of a commercial or warlike character." From this and other passages in the judgment I infer that they were disposed to disregard altogether the nature of the preparations.

I pass now, however, to the head of argument addressed to us by both sides, and on which, in my opinion, the judgment of the Court must be mainly based, viz., on an examination of the statute itself, its object, preamble, and enacting language; and I own that, were it not for the great difference of opinion which seems to exist, I should not have thought it so difficult to construe as it would thence appear to be. It is a municipal Act, and is to be construed according to the ordinary import of the language employed. This was the rule of construction stated by Baron Parke in *Lyde v. Barnard* (a). The rule of construction is also clearly stated in *The Sussex Peerage Case* (b), by Chief Justice Tindal; thus, "If the words are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense; the words themselves do in such case best


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(a) 1 M. &amp; W. 99.

(b) 11 Cl. &amp; F. 143.



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declare the intention of the lawgiver." And I confess I approve, as applicable to this statute (as to the character of which I agree with the remarks made by my brother *Channell*, though I say it now with deference after the Lord Chief Baron's observations,) of Lord *Coke's* rule in *Bonham's Case* (a), where he says, "The good expositor makes every sentence have its operation to suppress all the mischiefs; he gives effect to every word in the statute; he does not construe it so that anything should be vain and superfluous nor makes exposition against express words."

Bearing in mind these rules of exposition, I find that the Foreign Enlistment Act plainly recites the mischief, and the cause of it which it is designed to prevent, viz., "The fitting out and equipping and arming of vessels by her Majesty's subjects without her Majesty's licence, for warlike operations, which may be prejudicial to and tend to endanger the peace and welfare of this kingdom." This language is tolerably plain, and I pass on to consider the enacting clause, where the mode of prevention is stated.

The language of it is varied, and as I think in some respects studiously varied from that of the preamble. There is introduced into it the additional word "furnish;" the copulative "and" is changed into the disjunctive "or," to connect the four much debated words; instead of the expression "fitting and equipping and arming of vessels for warlike operations," which is the language of the preamble, the expression is "equipping, furnishing, fitting out, or arming, of any ship or vessel with intent or in order that such ship or vessel shall be employed in the service of any foreign prince, &c., as a transport or store ship, or with intent to cruize or commit hostilities," &c. It is agreed on all hands that the latter words, "with intent," may be taken

(a) 8 Rep. 117.

as omitted here. The clause is also directed not only against the principal offences stated in the preamble, but also against any attempt to commit them, and also against the knowingly aiding, assisting, or being concerned in them; offences expressly, of course, mentioned for the purpose of the forfeiture. The enacting clause, therefore, is more extensive than the preamble, but I take it to be a clear rule of construction, that where that is the case effect must nevertheless be given to the larger words of the clause.

It would be unnecessarily lengthening my judgment if I attempted to review all the arguments on this part of the case. I shall, therefore, confine myself to noticing some of them, in the course of stating my own views. And first, I do not think that the legislature have used any apt words to prohibit the building a hull of a vessel as contradistinguished from equipping it for sea, and for other purposes. It seems to me that if such had been the intention, it would have been done plainly by the use of the word "build" before the expressions "equip," &c., and that it is impossible for a Court to guess that such might have been the meaning, as was argued by the Attorney General, from the use of so doubtful an expression as that of "fit out," rendered more doubtful for such a purpose by its collocation in the sentence, not standing even in the position which it occupies in the American statute, namely, first, but placed among expressions plainly signifying acts done on a vessel in existence. And when reference is made to the forfeiture clause, it is to be observed that neither the "hull" nor the "building materials" are enumerated there; but, as before observed, the latter words which were to be found in the American Act appear to be studiously omitted, and no equivalent ones are substituted. The subject was one too prominent to have escaped the observation of the framers

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of the statute, and I am led therefore to infer that the legislature had reasons for not interfering with the ship-building trade, as such, in contradistinction to the business of equipping ships. It may have been because of its extent and importance, or the legislature may have hoped to prevent the mischief aimed at by less objectionable means, or (and I think that most probable) it may have considered that ample time would be afforded between the completion of the hull and the equipments necessary to enable it to leave the port, during which its destination being ascertained, if illegal, a seizure could be effected. Whether I am right in these suggestions or not, I find no distinct prohibition against the building of a hull or vessel, and I feel bound, therefore, to say, that by building merely no forfeiture is incurred. But I am of opinion that any act of equipping, furnishing, or fitting out done to the hull or vessel, of whatever nature or character that act may be, if done with the prohibited intent, is expressly within the plain language and also within the evident spirit of the statute. The intent I take to mean an intent of the principal (who has control of the ship) having directly for its object the employment of the vessel by a foreign state, and in the equipper a like intent, and with such intent a contributory equipment of some kind necessary to such employment, and it is evident that the intents need not be derived solely from the nature of the equipments, but may be proved aliunde. It may not be easy to define in all cases the exact point at which the building of the hull ends and the act of equipping or fitting out begins, but that in each case would be for a jury to decide.

I will now state some reasons for the construction at which I have arrived. I feel bound where the legislature has used different expressions having different meanings,

and has coupled them with the disjunctive "or," not to treat them as if they were coupled with the copulative "and," or as merely redundant expressions, unless I am compelled by the context to do so, but to give effect to each of them so far as they will admit of it, unless I thereby find that manifest injustice or absurdity will result. I do not find that in the present case, and I therefore do suppose that the legislature attached different meanings to the several expressions. I further think it impossible to believe that the word "and" in the American statute should have been so pointedly changed to "or" by our legislature without some object.

It was argued that the four expressions are to be construed as ejusdem generis; the word "arm" being the distinctive feature. But, in my judgment, the use of so many as four different words can hardly have been meant to express precisely the same thing; and it is obvious that the words "equip, furnish," and "fit out," are used in the section, for some purposes at least, to signify something different from the word "arm." For instance, as applicable to a transport or store ship, they are so used. Then these words being there used, as they must be, to signify peaceful equipments, it would seem a very forced construction to say that they exclude the same meaning when applied to a ship intended to commit hostilities, although that ship equally requires peaceful equipments with a transport or store ship.

But it was urged, and more particularly by Mr. *Mellish*, that the several expressions may have a several effect given to them, only that their meaning should be restricted to equipments of a distinctive character, according to the nature of the ship; and therefore that a ship intended for war must have warlike equipments.

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I think that this construction would in effect be introducing into the statute words that are not to be found there, which is quite as objectionable as striking out words which are there, or it would be changing the collocation of the language for the purpose of forcing its meaning; for it is not said in the statute that those equipments alone are unlawful which shall make the ship fit in all respects for its purpose, whether as a store ship or to commit hostilities; but those equipments are unlawful which are supplied with intent that the ship shall be employed in the service of a foreign state, and then the several services in which it shall not be so employed are enumerated, the service of committing hostilities being only one of them.

Again it is admitted by the claimants' counsel that a complete equipment is not necessary to the violation of the statute, but that a partial one is sufficient, if of the distinctive kind; and further, that as regards a war ship any warlike equipment, even short of arming, is forbidden. The consequence would be that you may not put one gun carriage or gun on board without a violation of the statute, and yet by such partial warlike equipment the ship would be no more in a position to commit hostilities than she would if she was only peacefully equipped. But it seems to me that a strange result would be produced if we were to hold that the statute intended to prohibit only warlike equipments in a ship of war, founded on the words "equip with intent to commit hostilities," which was Sir *Hugh Cairns*' argument; for that reasoning would drive us to say that only such warlike equipments are forbidden as would enable the ship to commit hostilities, as was argued in *Quincy's case*. The consequence would be that this vessel might have its pivot guns on board, and yet no offence

be committed against the statute, because without the cannon balls and powder her equipment would still be useless for actually committing hostilities; so that if the intention really were to go out of port equipped with a full armament, but not to receive her ammunition on board until she was out of the English waters, the 7th section would still not be violated.

Again, with reference to the necessity of distinctive equipments, I have not heard that there are any such applicable to a store ship, except the ordinary peaceful ones which a merchant ship requires. And if the argument of distinctive equipments will not hold as to all the several ships pointed out by the statute, I do not think that I have a right to apply it arbitrarily to one class, viz., to ships equipped with intent to commit hostilities.

As regards the meaning of the several expressions, and the necessity for the use of them in the statute, it may be that the word "equip" in its largest sense would alone have sufficed; but probably an interpretation clause would have been requisite, as it certainly means different things when applied to different subject matters. In Falconer's Marine Dictionary it is defined as "a term frequently applied to the business of fitting a ship for sea or arming her for war," and I think, therefore, the other expressions may be regarded as in the nature of words of interpretation of the possibly ambiguous expression "equip," and meaning the same as if the words had been a prohibition of equipment, including ships' furniture of all kinds, and arms. But because the word "arm" is added to the others in order fully to express a complete description of the equipments peaceful and warlike of a war vessel, I feel it impossible to say that I ought so to construe the section as to deprive the other expressions, to which it is superadded, of their ordinary

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meaning. I do not therefore in the result find any reason for this distinctive construction. In my view the prohibited intent is the main ingredient, and any act of equipping done in furtherance of that intent, will constitute the whole offence; for assuming the same intent to be present in two persons, I do not see the difference between the agent who did put on board this ship the cooking apparatus sufficient for 150 or 200 men and fitted the stanchions, and the man who might have put on board a pivot gun to have played over the low bulwarks when ammunition should be supplied by some one afterwards. Both would be acting with a common object, and the part contributed by each would equally conduce to the fulfilment of it.

Before I could come to the conclusion contended for by the claimants, in the absence of plainer words to that effect, I must believe that the legislature, when enacting a forfeiture and power to arrest a vessel, meant to deprive itself of all reasonable opportunity for exercising that power, and that too when the avowed object is to prevent the vessel leaving the English port, and not merely to punish offenders by indictment afterwards. Upon this restricted construction it is practically plain that the statute would be set at defiance in one of two ways, either as was done by the "Alabama," whose armaments went out in another ship, or by completing the peaceful equipments first, and then putting on board the guns as the last act in port, probably occupying a few hours at most, and giving no opportunity of seizure and prevention. In fine, I see no more reason for saying that the ship must, in order to violate the statute, be so equipped in our ports with arms as to be ready to commit hostilities on leaving them, than for saying that she must be sufficiently manned also, without which she would certainly not be in such a condition. I cannot so restrict the

statute by construction without feeling that I should virtually repeal it.

In arriving at my construction I do not feel pressed by Sir *Hugh Cairns*' argument of inconsistency in drawing so sharp a line between the building and the equipping, for the same might be said of the distinction which does exist between selling an armed vessel to a belligerent and arming one with the requisite intent under an order of the same purchaser; the line is equally sharp, and the only difference is in the place where it is to be drawn. Indeed this argument is rather to be addressed to the lawgiver than to the expounder, if there be inconsistency in the legislation. Admitting, as I do, that there is inconsistency in the state of this law as to what is lawful and what is not, I believe nevertheless that the lesser amount of inconsistency is incurred by adhering to the ordinary meaning of the language employed as I have above construed it.

Upon this view of the statute in my opinion the proper direction to the jury would have been that they should first look to see whether the equippers had had the intention which I have above mentioned, together also with the intent of the principal as explained by my brother *Channell*; and, secondly, whether with such intent they had done any act towards equipping, furnishing, or fitting out the ship, beyond the mere work of building the hull of the vessel, or had attempted or endeavoured so to do; and I agree with the definition of the attempt which my brethren have given. But looking at the whole of the direction of the Lord Chief Baron (which I need not criticise at length after my brother *Channell's* judgment), although his Lordship does appear to have left the question of equipping, furnishing, or fitting out to the jury in the alternative, yet I think there are other passages of the summing up which are inconsistent, and

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which would have a tendency to mislead them. I need not recapitulate them, as my brother *Channell* has done so at full length, and I therefore conclude by saying that I think that the jury should have been distinctly told that the intent as before defined being established to their satisfaction, any act of equipping in furtherance of such intention would be unlawful within the meaning of the statute.

I am also further of opinion that, even if my construction of the statute be incorrect, and if it ought to be construed as Mr. *Mellish* contended, that is, as prohibiting only equipments of a distinctive character, yet that upon the evidence above stated there was sufficient upon which to direct the jury that the claimants had supplied distinctive equipments within that meaning of the Act. The evidence to which I allude is the proof of the fitting stanchions for hammock racks and the cooking apparatus for a crew of 150 or 200 people to a war vessel. I do not find that such direction was given, and I am therefore of opinion that, upon the ground of an insufficient direction, there ought to be a new trial.

On the other ground, that the verdict was against the evidence, I agree with my brother *Channell*, that it is unnecessary for me to decide it, as I think that the rule should be made absolute on the ground of insufficient direction.

The COURT being equally divided in opinion as to whether the rule ought to be made absolute, *Pigott*, B., withdrew his judgment, and the rule was discharged.

Rule discharged.

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Feb. 6.

THE Crown having appealed to the Exchequer Chamber against the decision of the Court of Exchequer in discharging the rule for a new trial, the appeal came on for argument in the following Hilary Vacation (*a*) (Feb. 6).

Sir *Hugh Cairns* (*Karslake, Mellish* and *Kemplay* with him), for the defendants.—The Court has no jurisdiction to hear this appeal. When the Court of Exchequer discharged the rule nisi for a new trial, the proceedings in that Court were at an end, with the exception of the ministerial act of entering up the judgment. Before the Common Law Procedure Act, 1854, there could be no appeal; and there can be none under that Act, because it applies only to personal actions commenced by writ of summons. But on the 4th of November, 1863, and before the rule nisi was granted, some rules (*b*) were promulgated by the Court of Exchequer, which it is said give a right of appeal. Those rules profess to be made under the 26th section (*c*) of the Queen's Remembrancer's Act, 22 & 23 Vict. c. 21, and to extend, to the revenue side of the Court of Exchequer, the provisions of the Common Law Procedure Act, 1854, with respect to

By the 26th section of the Queen's Remembrancer's Act, 22 & 23 Vict. c. 21, "it shall be lawful for the Lord Chief Baron and two or more Barons of the Court of Exchequer from time to time to make all such rules and orders as to the process, practice, and mode of pleading on the revenue side of the Court, and as to the allowance of costs, and for the effectual execution of this Act, and the intention and objects thereof, as may seem to them necessary and proper; and also from time to time, by any such

rules or orders, to extend, apply, or adapt any of the provisions of the 'Common Law Procedure Act, 1852,' and the 'Common Law Procedure Act, 1854,' and any of the rules of pleading and practice on the plea side of the said Court to the revenue side of the said Court, as may seem to them expedient for making the process, practice, and mode of pleading on the revenue side of the said Court as nearly as may be uniform with the process, practice, and mode of pleading on the plea side of such Court."—*Held*, in the Exchequer Chamber, that the above enactment did not confer a power by rule or order to extend, apply, or adapt to the revenue side of the Court of Exchequer the provisions of the Common Law Procedure Act, 1854, as to appeal: Per *Cockburn*, C. J., *Crompton*, J., *Blackburn*, J., and *Mellor*, J.—*Dissentientibus Erle*, C. J., *Williams*, J., and *Willes*, J.

- (*a*) Before *Cockburn*, C. J., and *Mellor*, J.  
*Erle*, C. J., *Williams*, J., *Crompton*, J., *Willes*, J., *Blackburn*, J.,  
 (*b*) *Antè*, p. 429.  
 (*c*) *Post*, p. 584, note.


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appeal.—(He then stated the rules.)— It may be observed that the 3rd rule, which is in terms the same as the 36th section of the Common Law Procedure Act, 1854, says:—The Court of Error, the Exchequer Chamber, and the House of Lords, shall be Courts of appeal for this purpose.” But the term, “The Court of Error,” in the rule has no meaning; in the Common Law Procedure Act it is intelligible and necessary, because that Act applies not only to the superior Courts of law at Westminster, but to the Courts of Lancaster and Durham, and might, by order in council, be made applicable to other inferior Courts of record. If the Court of Exchequer has power by a general order to create new Courts of appeal, to give new rights to suitors, and confer on the House of Lords and this Court the powers professed to be conferred by these rules, they can only do it under the authority of parliament. The 22 & 23 Vict. c. 21 is intitled, “An Act to regulate the office of Queen’s Remembrancer, and to amend the practice and procedure on the revenue side of the Court of Exchequer.” It recites, amongst other things, that “it is expedient further to regulate the said office, and to make other provisions in relation thereto, and to the procedure on the revenue side of the Court.” No doubt the preamble cannot restrain the enacting clauses if they contain provisions more extensive than the preamble; but if there are no such provisions, the purpose of the Act is declared by the preamble. The first eight sections have no bearing on the present question. The 9th section extends the 222nd section of the Common Law Procedure Act, 1852, to proceedings on the revenue side of the Court of Exchequer. The 10th section enables the parties in any proceeding on the revenue side of the Court of Exchequer, by consent, to state a special case for the opinion of the Court without pleadings, and upon judgment thereon to bring error, and it directs what the

Court of error shall do with reference to that case. That section is virtually an incorporation of the 46th section of the Common Law Procedure Act, 1852, and the 32nd section of the Common Law Procedure Act, 1854. The 11th section provides for the costs of the special case. The 12th section gives a right of appeal from the decision of the Court of Exchequer in cases of appeal to that Court under the provisions of the Succession Duty Act, 1853. The 13th section points out the Courts of appeal. The 14th section requires notice of appeal within four days after the decision. The 15th section provides for appeal in summary proceedings for succession or legacy duty. The 16th and 17th sections are not material to the present question. Then follow provisions as to error in its strict and proper sense, in which the proceedings were formerly commenced by writ of error; and the provisions in that respect of the Common Law Procedure Act, 1852, have been adopted and applied by parliament to the revenue side of the Court of Exchequer. The 18th section prescribes the time within which error must be brought. That section corresponds with the 146th and 147th sections of the Common Law Procedure Act, 1852. The 19th section abolishes the writ of error. That section corresponds with the 148th section of the Common Law Procedure Act, 1852, with a special interpolation authorizing the Barons of the Exchequer to make a rule as to giving bail or security. The 20th section enables either party to tender a bill of exceptions on the trial of any issues on the revenue side of the Court. Therefore parliament has adopted every provision in the Common Law Procedure Act, 1852, with regard to error properly so called, but has omitted those provisions in the Common Law Procedure Act, 1854, which relate to appeal in the event of a rule for a new trial being refused, or discharged, or made absolute. It is evident, therefore, that

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parliament has considered it right that the provisions as to error, properly so called, should be extended to the revenue side of the Court of Exchequer, and has moreover indicated that it could not be done without its authority. The 26th section (a) is divided into two parts. The first authorizes the Lord Chief Baron and two or more Barons, "from time to time to make all such rules and orders as to the process, practice, and mode of pleading on the revenue side of the Court, and as to the allowance of costs, and for the effectual execution of the Act, and the intention and objects thereof, as may seem to them necessary and proper." That is a power to make rules and orders as to the process, practice, and mode of pleading in a particular branch of the jurisdiction of the Court; but assuming that it extended to the whole, what would be its meaning? The Barons may regulate in any way they think fit the internal arrangement of their Court. They are absolute as to process, practice, and mode of pleading; but they cannot create new Courts, or give to suitors rights external to their Court. They cannot say, "we ordain that the Privy Council, the Exchequer Chamber, or the House of Lords shall be Courts of appeal from our Court, and that suitors shall have a right

(a) Sect. 26.—"It shall be lawful for the Lord Chief Baron and two or more Barons of the Court of Exchequer from time to time to make all such rules and orders as to the process, practice, and mode of pleading on the revenue side of the Court, and as to the allowance of costs, and for the effectual execution of this Act, and the intention and objects thereof, as may seem to them necessary and proper; and also from time to time by any such rule or order to extend, apply, or

adapt any of the provisions of the "Common Law Procedure Act, 1852," and the "Common Law Procedure Act, 1854," and any of the rules of pleading and practice on the plea side of the said Court to the revenue side of the said Court, as may seem to them expedient for making the process, practice, and mode of pleading on the revenue side of the said Court as nearly as may be uniform with the process, practice, and mode of pleading on the plea side of such Court."


to resort to those tribunals; and we require them to hear appeals." They cannot prescribe what mode of proceedings those tribunals shall adopt, nor whether they shall or shall not award costs. Their jurisdiction is territorial: within their own Court they are supreme; beyond it, powerless. When they have performed their duty as Barons of the Exchequer by pronouncing judgment in the case as before them, they are *functi officio*. Could it be said that under a power for the County Court Judges to make rules as to the process, practice, and mode of pleading in those Courts, they could order that the suitors should have a right of appeal to the Court of Queen's Bench, Exchequer Chamber, or the House of Lords. Then do the words "for the effectual execution of this Act, and the intention and objects thereof," make any difference? Clearly not. The Barons of the Exchequer may make rules as to bail in error, because the 22 & 23 Vict. c. 21 has authorized proceedings in error; but they cannot make rules as to where error shall be brought. Then the second part of the 26th section (a) says:—"And also from time to time, by any such rule or order, extend, apply, or adapt any of the provisions of the Common Law Procedure Act, 1852, and the Common Law Procedure Act, 1854, and any of the rules and practice on the plea side of the said Court to the revenue side of the said Court." Stopping there, and supposing the enactment applied, not merely to the revenue side, but to the whole jurisdiction of the Court, what would be its meaning? It would be a power to extend, apply and adapt those particular provisions which, when extended, applied and adapted, would become part of the process, practice and pleading of the Court of Exchequer, not of the Exchequer Chamber, or House of Lords. All doubt is removed by the words which follow:—"As may seem to them expedient for making the

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(a) *Anté*, p. 584, note.

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process, practice, and mode of pleading on the revenue side of the said Court as nearly as may be uniform with the process, practice, and mode of pleading on the plea side of the said Court." The rules promulgated on the 22nd of June, 1860 (a), afford an illustration of the meaning of the section. These rules, which embrace every step in a suit on the revenue side of the Exchequer, the writ, information, pleas trial, verdict and judgment, are framed with extreme attention to the power and jurisdiction of the Court. But to give a new right of appeal to a suitor against whom judgment has been pronounced, and to deprive the successful suitor of his immediate right to the fruits of his judgment, is no part of the process, practice, or mode of pleading of the Court.


The Attorney General (The Solicitor General, The Queen's Advocate, Locke and T. Jones with him), for the Crown.—The Court of Exchequer had power to make these rules. The first branch of the 26th section of the 22 & 23 Vict. c. 21 authorizes the Court to make rules as to the "process, practice, and mode of pleading on the revenue side of the Court." The second branch of the section gives a new and different power, viz., "to extend, apply, or adapt any of the provisions of the Common Law Procedure Act, 1852, and the Common Law Procedure Act, 1854," to the revenue side of the Court. Parliament has authorized the Court, not to legislate by way of giving jurisdiction to or creating Courts of appeal, but to extend, apply, or adapt any of the provisions of certain acts of parliament already passed; and the question is whether that which the Court has done is or is not an extension, application, or adaptation of some of the provisions of those Acts to the revenue side of the Exchequer. The argument for the defendants is based on the assumption that procedure in error is no part of the process,

(a) 6 H. & N. i.

practice, or mode of pleading on the revenue side of the Court; but it is evident, from the language of the 26th section of the 22 & 23 Vict. c. 21, that it was meant to be included. The expression, "process, practice, and mode of pleading," is the formula used by parliament to introduce the entire enactments of the Common Law Procedure Act, 1852. That Act is intituled "An Act to amend the process, practice, and mode of pleading in the superior Courts of common law at Westminster." The preamble recites that "the process, practice, and mode of pleading in the superior Courts of common law at Westminster may be rendered more simple and speedy." Therefore the whole of the clauses in that Act are declared by the preamble to be enacted for the purpose of rendering more simple and speedy the "process, practice, and mode of pleading in the superior Courts of common law at Westminster," an expression intended to include proceedings in error, even though carried up to the House of Lords, which undoubtedly is not a superior Court of common law at Westminster. The 148th section says that a writ of error shall not be used, and that the proceedings in error shall be a step in the cause. [*Erle, J.*—A writ of error was formerly a new action.] The 149th section prescribes the mode in which proceedings in error are to be commenced. By the 152nd section, instead of the assignment of and joinder in error, a suggestion may be entered on the judgment roll to the effect that error is alleged by the one party and denied by the other. By the 155th section, upon such suggestion being entered the cause may be set down for argument in the Court of error, and the judgment roll shall be brought by the Master into the Court of Exchequer Chamber; or if the proceedings in error be before the High Court of Parliament, then before the High Court of Parliament; and the Court of error may thereupon review the proceedings, and give judgment

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thereon, which shall be entered on the original record; and such further proceedings as may be necessary thereon shall be awarded by the Court in which the original judgment was given. The 156th section empowers Courts of error in certain cases to quash the proceedings in error. The 157th section requires Courts of error to give such judgment and award such process as the Court from which error is brought ought to have done. Therefore the manner in which the case is to be brought into the Court of error, whether the Exchequer Chamber or House of Lords, the manner in which the Court of error is to give judgment, the effect of that judgment and the power which the Court of error is to exercise over the proceedings, are treated as part of the code of procedure introduced for the purpose of amending the process, practice, and mode of pleading in the superior Courts of common law at Westminster.

Again, with respect to the 22 & 23 Vict. c. 21. The 19th section of that Act is not a mere adaptation of the 148th section of the Common Law Procedure Act, 1852, but an independent and substantive enactment. It makes no reference to the Common Law Procedure Act, 1852; and but for the rules of the Court of Exchequer the clauses referred to would not apply to a proceeding in error under the 19th section. That section distinctly recognises proceedings in error on the revenue side of the Court as a step in the cause, and when the 26th section (a) declares that the provisions of the Common Law Procedure Act may be extended to the revenue side of the Court, it means to all proceedings in a cause depending on that side of the Court, and a proceeding in error is expressly declared by the 19th section to be one. [*Cockburn C. J.*—The 19th section does not apply to a proceeding by way of appeal.] But it throws light on the construction of the 26th section, because,


(a) *Antè*, p. 584.

in the analogous case of error properly so called, the 22 & 23 Vict. c. 21 did not embody all the provisions of the Common Law Procedure Act, 1852, but left the Court of Exchequer to apply them under the power conferred by the 26th section. Accordingly the Court of Exchequer, in pursuance of the provisions contained in that section, made the rules of the 22nd of June 1860 (*a*). The 97th rule prescribes the mode of commencing proceedings in error. The 98th relates to stay of execution and bail. The 99th prescribes the mode of pleading in error; and the 100th the mode in which the roll is to be made up. By the 101st the Court ordered that the provisions contained in the 154th, 155th, 156th, and 157th sections of the Common Law Procedure Act, 1852, where applicable, shall extend and be applied in like cases on the revenue side of the Court. The 103rd rule extends and applies the sections 159 to 166 of that Act. It would have been a *casus omissus* if the Court of Exchequer had no power under the 26th section to apply to the revenue side of the Court the provisions as to error in the Common Law Procedure Acts; and by the rules in question they have now more declared what the Exchequer Chamber or House of Lords shall do in case of appeal than, by the former rules, they have declared what those Courts shall do in proceedings in error. The power conferred by the 26th section is to declare what provisions of the Common Law Procedure Acts shall be applicable to the revenue side of the Court of Exchequer, and the Court has declared that certain sections of those Acts which relate to proceedings in Courts of error shall be applicable. It is a fallacy to say that the Court of Exchequer has taken upon itself to legislate, it has merely exercised a power conferred by parliament. The 35th section of the Common Law Procedure Act, 1854, is the leading

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one on which this matter arises, and every condition which gives the appellant a locus standi is fulfilled in the Court of Exchequer, so that that Court has jurisdiction over the appeal as part of the process of that Court. The rational interpretation of the 26th section is, that it enables the Court of Exchequer, if it thinks fit, to apply any of the provisions of the Common Law Procedure Acts, 1852 and 1854, to the revenue side of the Court of Exchequer. The argument for the defendants would render the latter part of that section superfluous. Why is the power given if it cannot be exercised except for an object which may be accomplished by making rules or orders under the former part of the section? There is an obvious difference between the power to make rules and orders and the power to apply certain provisions of an act of parliament. Rules and orders operate by the authority of the Court, but the provisions of an act of parliament, when applied, operate by the authority of parliament. By the 20th section of the 22 & 23 Vict. c. 21 either party may tender a bill of exceptions on the trial of any issue on the revenue side of the Court; and the appeal given by the 35th section of the Common Law Procedure Act, 1854, is only another mode of arriving at the same result. The legislature in express terms gave a right to appeal in revenue cases by bill of exceptions, but left it to the discretion of the Court of Exchequer to determine whether the alternative mode of procedure by way of appeal could be conveniently applied to those cases. If the 22 & 23 Vict. c. 21 had contained these words, "All the provisions of the Common Law Procedure Act, 1854, shall be applied to the revenue side of the Court of Exchequer;" would not the clauses relating to appeal have been as applicable as any others? The only difference is that the legislature has empowered the Court from time to time by rule or order to apply them. They

are applied to proceedings commenced, and causes pending on the revenue side of the Court of Exchequer, and the right of appeal given by the 35th section of the Common Law Procedure Act, 1854, and the provisions of the 37th, 38th and 39th sections operate upon the record for all purposes while it is in the Court of Exchequer; and what afterwards takes place in the Court of error is a mere sequence. The record, though carried up to the Court of error, never ceases to be a record of the Court of Exchequer. This view is fortified by the concluding words of the 26th section of the 22 & 23 Vict. c. 21, "as may seem to them expedient for making the process, practice, and mode of pleading" (which means procedure) "on the revenue side of the Court as nearly as may be uniform with the process, practice, and mode of pleading on the plea side of the Court." The legislature, having applied the procedure by way of appeal to the plea side of the Court of Exchequer, empowered the Court, if it thought fit, to make the procedure on the revenue side of the Court uniform with that on the plea side.

Sir *Hugh Cairns*, in reply.—The creation of a new right of appeal and a new Court to hear it is not "process" of the Court from which the appeal comes. Because the preamble of the Common Law Procedure Act, 1852, states that its object is "to amend the" process, practice, and mode of pleading in the superior Courts of common law at Westminster, and the Act contains provisions relating to error, and the mode in which the Courts of Exchequer Chamber and House of Lords shall thereupon proceed, it is assumed that the provisions respecting those Courts are part of the "process, practice, and mode of pleading of the superior Courts." But although the motive for legislating was to amend the process, practice, and mode of pleading in the

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superior Courts, the legislature would naturally determine what was to be done with causes commenced in those Courts when they reached the Exchequer Chamber or House of Lords. The Common Law Procedure Act, 1852, dealt only with error, properly so called. It did not create any new right of appeal, but amended the existing law, by which a suitor, as a matter of right, could, by writ of error, bring the record before a Court of error. That is wholly inapplicable to the new right of appeal created by the Common Law Procedure Act, 1854. The 155th section of the Common Law Procedure Act, 1852, makes a distinction between proceedings in the Court of error and in the Court below, and treats them as independent Courts. The 148th section, by which the proceeding to error is made a step in the cause, and which was extended to the revenue side of the Court by the 19th section of the 22 & 23 Vict. c. 21, does not apply to proceedings by way of appeal. With respect to proceedings in error, the 19th section confers a special power on the Court of Exchequer to make rules or orders as to the terms and conditions of bail and security. Again, if any difficulty should arise as to the *modus operandi* in the proceedings in error, a special power is conferred by the 26th section to make rules and orders for the effectual execution of the Act, and the intention and object thereof. The argument derived from the 35th section of the Common Law Procedure Act, 1854, is not tenable. It does not follow, because certain occurrences in the Court below are conditions precedent to a right of appeal, therefore the Court below has jurisdiction over the appeal as part of its process. The power given by the 26th section is to apply the provisions of the Common Law Procedure Acts, not to informations filed in the Court of Exchequer, but to the revenue side of that Court; and it cannot attach to informations rights and liabilities wholly unconnected with the process

and practice of that Court, and within the jurisdiction of other Courts. It is said that parliament meant to leave it in the discretion of the Court of Exchequer to determine whether the right of appeal should be applied to revenue causes; but, if so, any rules made by the Court on this subject would be fluctuating and changeable; for the power to make rules is to be exercised from time to time. Parliament, after laying down the cardinal principles, has left it to a majority of the Court to work out the details. If it is left to their discretion, when, how far, and in what manner they will introduce the provisions of the Common Law Procedure Act, 1854, as to appeal, they might apply them by degrees and in part, and they might direct that an appeal should at once lie to the House of Lords, passing over the Exchequer Chamber. Again, one day they might make the rules, and another day abrogate them, and say there shall be no appeal. But, assuming that the power is to be exercised once for all, can it be supposed that parliament would delegate its authority to the Court and enable it to legislate for itself and its suitors in a proceeding of a more extensive nature than a bill of exceptions. If parliament, after giving specific power to proceed in error in certain cases, had gone on to say that such provisions of the Common Law Procedure Acts shall be applied as will make the process, practice, and mode of pleading on the revenue side of the Court uniform with that on the plea side, that would be an extension of those proceedings only which regulate the process, practice, and mode of pleading, and would not give a right of appeal. It is said that this is still a revenue cause in the Court of Exchequer, but the 10th section of the 22 & 23 Vict. c. 21 draws a marked distinction between the two Courts. Moreover the cause is now entitled "In the Exchequer Chamber." Any consideration with respect to the record does not affect the case. The order of the Court discharging the rule for a new trial is not

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noticed on the record. If the rules and orders authorized to be made by the first part of the 26th section of the 22 & 23 Vict. c. 21 are confined to "process, practice, and mode of pleading," the same construction must be put on the latter part of the section, by which authority is given to extend, apply, or adapt the provisions of the Common Law Procedure Acts. Under a power to make rules as to process, practice, and mode of pleading, it is doubtful whether the Court could apply, extend, and adapt the provisions of an act of parliament. It is also doubtful whether under such a power they could have created and issued a writ of injunction as part of the process, practice, and mode of pleading of the Court. An appeal is no part of the process, practice, or mode of pleading of the Court. As revenue causes are proceedings *in rem*, and conclusive not only on the parties but on all persons, there may be good reason for requiring that they should be reviewed, if at all, by proceedings in error upon a formal record, and not by way of appeal.

The Attorney General claimed the right to the last reply, by virtue of his office.

COCKBURN, C. J.—In the case of *O'Connell v. Regina* (a), it was laid down that it was not a necessary incident to cases in which the Crown was defendant in error, that the counsel for the Crown was to have the last word. It is, however, open to us in the exercise of our discretion to hear you, but it must not be considered as establishing a precedent.

The Attorney General, in reply.—There is a distinction between rules made by the Court of Exchequer concerning matters within its province, and rules made in execution of a statutory power. In the former case the Court may revoke

(a) 11 Cl. & F. 185. 231.

them, but parliament has authorized the Court to apply the provisions of certain acts of parliament to the revenue side of the Court. When that is done their function ceases, for the provisions operate by virtue of the statute which created the power. The words are, to "extend, apply and adapt," not *recall*. The Court has simply the power of saying whether the provisions shall be extended to the revenue side of the Court. The right of appeal is merely the same in another form as that given by a bill of exceptions. The 35th section of the Common Law Procedure Act, 1854, is strictly limited to a motion for a new trial on the ground that the Judge has not ruled according to law, which is clearly the subject of a bill of exceptions. The 34th section gives an appeal where a point has been reserved at the trial. An appeal being a more convenient and effectual mode of procedure than a bill of exceptions, the legislature may well have confided to the Court of Exchequer the duty of considering whether there was anything which rendered it inapplicable to revenue cases. In the end there would be a record; and, therefore, for the purposes of proceedings *in rem*, an appeal would ultimately make no difference and would be as beneficial to the subject as to the Crown.

Cur. adv. vult.

The learned Judges having differed in opinion, on the 8th of February, 1864, delivered their judgments seriatim.

MELLOR, J.—After a careful consideration of the arguments which were urged by the Attorney General in this case, and with every desire to support the validity of the rules made by the Court of Exchequer on the 4th of November last, under the provisions of the 22 & 23 Vict. c. 21, intituled "An Act to regulate the office of Queen's Remembrancer, and to amend the practice and procedure

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on the revenue side of the Court of Exchequer," I am compelled to come to the conclusion that the rules 1, 2 and 3, under the authority of which the present appeal is brought, are not warranted by that statute, and that the claimants are entitled to succeed upon the objections which were made by Sir *Hugh Cairns* to our proceeding with the cause.

In order to sustain the right to appeal, the Attorney General was driven to contend that the legislature, in providing for the amendment of the "practice and procedure" on the revenue side of the Court of Exchequer, had incidentally delegated to the Lord Chief Baron and two or more Barons the power to determine whether or not an appeal should lie from a judgment of their own Court, in certain cases, to the Court of Exchequer Chamber and the House of Lords. The suggestion is of a power so unusual, that it appears to me to require a clear and unambiguous expression of the intention of the legislature that such should be the case, in order to support it.

In the Common Law Procedure Act of 1852, the legislature, after making many express alterations and amendments in the process, practice and mode of pleading in the superior Courts of law, did, by section 223, confer upon the Judges, *or any eight or more of them, of whom the chiefs of each of the said Courts should be three*, power from time to time to make all such general rules and orders for the effectual execution of the said Act, and of the intention and object thereof, &c., "as in their judgment might be necessary and proper;" but it gave no larger power than was necessary in order to enable the Judges to make such rules and orders as were incidental to the complete carrying into effect of the alterations and amendments made by the legislature itself. The Common Law Procedure Act of 1854, which was for "the further amendment of the process, practice, and mode of pleading in, and

enlarging the jurisdiction of the superior Courts of Common Law," was framed upon similar principles; and by section 32 it expressly gave to litigants the right to bring error on a special case in the same manner as on a special verdict; and by section 34, in case of rules to enter a verdict, or for a nonsuit upon a point reserved at the trial, it gave the power to appeal against the judgment of the Court in refusing, discharging, or making absolute such a rule. And by section 35, in cases of misdirection, it conferred a similar right of appeal from the judgment of the Court in the event of one judge dissenting, or the Court in its discretion granting permission to appeal; and by section 36 it enacted that the Court of error, the Exchequer Chamber, and the House of Lords should be Courts of appeal for the purposes of that Act. By the 97th section it gave power to the Judges, under the like conditions as in the Procedure Act of 1852, to make general rules and orders for the effectual execution of the Act. I have referred to several sections of the Common Law Procedure Act of 1854, because they contain the provisions which the Court of Exchequer has by the rules of the 4th of November assumed to extend, apply, and adapt in order to provide a remedy by way of appeal to the particular circumstances of the present case.

Upon the passing of the Common Law Procedure Act of 1852, the Judges did make general rules, regulating the pleading and practice of the superior Courts of common law, in conformity with the power conferred upon them by that Act. In the Act of the 22 & 23 Vict. c. 21, now under consideration, the legislature appears to me to have provided for certain cardinal alterations in the practice and procedure on the revenue side of the Court of Exchequer, and to have given new, but special and limited, rights of appeal to litigants, and as was done in the Common Law Procedure Acts, to have left the details necessary to carry them into

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effect to the discretion of the Judges of the Court of Exchequer. By section 10, the Act enables litigants, by consent and by order of a Judge, to state any question of law in a special case, for the opinion of the Court, without pleadings; and upon a judgment thereon, error may be brought as on a judgment on a special verdict, unless the parties agree to the contrary; and it provides that the proceedings for bringing such special case before the Court of error shall be the same as in the case of a special verdict, except that the Court of error is to be required to draw inferences of fact which the Court below ought to have drawn.

By section 11 the costs of the proceeding are regulated. By section 12 an appeal is given to a Court of error from a decision of the Court of Exchequer in appeals under the provisions of the Succession Duty Act, 1853; and by section 13 it is expressly enacted that such appeal shall lie to the Court of error in the Exchequer Chamber, and that the decision of the said Court of error shall be subject to appeal to the House of Lords. By section 15 further provision is made for bringing error on special cases, to be stated with reference to legacy duty; and by section 16 the powers of the 1 Wm. 4, c. 22, and sections 46, 47, 48, and 49 of the Common Law Procedure Act, 1854, are expressly incorporated into that Act. By section 19 it is expressly provided that a writ of error shall not be necessary, and that the proceeding to error shall be a step in the cause. By section 20 power is expressly given to either party to tender a bill of exceptions on the trial of any issue; and section 21 provides for the costs of all suits, informations and other proceedings. By these sections a power to state a special case, a power of appeal in certain cases, and a power to each party to tender a bill of exceptions on the trial, are carefully and specially provided for; but no appeal is given against the judgment of the Court on

granting, refusing, making absolute, or discharging a rule for a new trial, or to enter a nonsuit or a verdict upon a point reserved at the trial.

There may be, and probably are, considerations which might render such a power inexpedient in revenue suits, and it can scarcely be imagined that the propriety of giving such a power escaped the consideration of the legislature when the special provisions above referred to were framed. The omission of such a power whilst other provisions are made for appeal and writs of error, leads me to the conclusion that this larger power of appeal was intentionally omitted from the Act. The answer attempted to be given to this view is, that the *right* of appeal is matter of practice, confounding, as it appears to me, the distinction between the right and the rules which regulate the right, and it is contended that by section 26 power is given to the "Lord Chief Baron and two or more Barons," not only to make rules and orders as to the process, practice, and mode of pleading on the revenue side of the Court for the effectual execution of the Act, but also "*from time to time* by any such rule or order to extend, apply, or adapt any of the provisions of the Common Law Procedure Acts of 1852 and 1854, and any of the rules of pleading and practice on the plea side to the revenue side of the said Court, as may seem to them expedient *for making the process, practice, and mode of pleading on the revenue side of the Court as nearly as may be uniform with the process, practice, and mode of pleading on the plea side of the said Court.*" It is argued that this clause gives an absolute *discretion* to "the Lord Chief Baron and two or more Barons" to incorporate with the Act under consideration any provision of the two Common Law Procedure Acts of 1852 and 1854, whether it gives new remedies to the subject, or enlarges the jurisdiction of the Courts, or gives a

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new authority to the Court of error in the Exchequer Chamber and to the House of Lords, or only alters or amends the process, practice, and mode of pleading in the superior Courts of Common Law.

Surely it is more reasonable to consider that a power which is to be exercised "*from time to time*" is more applicable to the extension, application, and adaptation of such provisions of the Common Law Procedure Acts as refer to process, practice, and pleading in their ordinary sense, and which may well be altered and amended "*from time to time*," than to provisions which *confer new remedies and enlarged jurisdiction*. This is made more apparent when it is considered that the reference to the provisions of the Common Law Procedure Acts is immediately followed by the words "and rules of pleading and practice on the plea side of" the said Court as may seem to them expedient *for making the process, practice, and mode of pleading* on the revenue side of the said Court as nearly as may be uniform with the process, practice, and mode of pleading on the plea side of the said Court. I can readily understand that the legislature may have entrusted "to the Lord Chief Baron and two or more Barons" power to make rules and orders, and to apply and adapt such provisions of the Common Law Procedure Acts, and such rules of pleading and practice as affect "process, practice, and the mode of pleading," so as to carry into effectual operation the alterations in the practice and procedure of the revenue side of the Court of Exchequer introduced by the Act. But I cannot understand the policy of intrusting to the Lord Chief Baron, and two or more Barons of that Court, the power to determine whether or not the Court of error in the Exchequer Chamber and the House of Lords shall have jurisdiction to entertain an appeal against a judgment of the Court of Exchequer in granting, or refusing, or discharging a rule for a new trial. The limited power to make rules and

orders conferred upon the Judges by the Common Law Procedure Acts required for its exercise a quorum of eight, of which the three chiefs of the Courts were to be members; but, according to the argument of the Attorney General, the present Act has conferred this most unusual and unprecedented authority to legislate for the Court of error and the House of Lords upon a bare majority of the Barons of the Exchequer. I cannot adopt that view; and inasmuch as I cannot consider the rules of the 4th of November as warranted by the statute 22nd and 23rd Victoria, I come to the conclusion that we have no jurisdiction to proceed with the appeal, and that it must therefore be dismissed. If I am wrong in the opinion which I have formed, and the rules are really authorized by the statute, the House of Lords will, by virtue of the very rules in question, have power to give the judgment which we ought to have given.

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BLACKBURN, J.—In this case the defendants, in a case on the revenue side of the Court of Exchequer, have obtained a verdict at the trial; a rule to set aside that verdict and grant a new trial on the grounds of misdirection, has been obtained in the Court of Exchequer, and, after argument, discharged. The Attorney General has come to this Court, treating it as a Court of appeal from the Court of Exchequer on this matter, with the object that we should inquire into the grounds of the decision, and, if satisfied that the Court of Exchequer ought to have made the rule absolute, that we should now do so, and set aside the verdict obtained for the defendants. The defendants have objected to our jurisdiction to entertain the cause, contending that we are not a Court of appeal from the Exchequer on this matter, that the decision of the Court of Exchequer is final, and that they have a right, in point of law, to retain their verdict undisturbed.

I am, I think, as a Judge, bound to form my opinion on

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this as a matter of law, and to deliver judgment according to what I think, without inquiring whether the result, as affecting this particular case, is satisfactory or not ; and after considering the case carefully I have come to the conclusion that the defendants are right on this point, and that we have no power to interfere with the verdict.

The whole question depends upon the construction of the 22 & 23 Vict. c. 21. That Act does not itself give the power of appeal ; but it contains a section, the 26th, which gives power to the " Lord Chief Baron, and any two or more Barons of the Court of Exchequer, from time to time, to make all such rules and orders as to the process, practice, and mode of pleading on the revenue side of the Court, and as to the allowance of costs, and for the effectual execution of this Act, and the intention and objects thereof, as may seem to them necessary and proper ; and also from time to time, by any such rule or order, to extend, apply, or adapt any of the provisions of the Common Law Procedure Act, 1852, and the Common Law Procedure Act, 1854, and any of the rules and practice on the plea side of the said Court, to the revenue side of the said Court, as may seem to them expedient for making the process, practice, and mode of pleading on the revenue side of the said Court, as nearly as may be, uniform with the process, practice, and mode of pleading on the plea side of such Court."

In intended pursuance of this power, rules have been made in last Michaelmas Term, of which the following seem to me material. By the 2nd rule an appeal is allowed in such cases as the present. By the 3rd, the Exchequer Chamber and the House of Lords are constituted Courts of Appeal for that purpose. By the 7th, it is prescribed that the Court of appeal shall give such judgment as ought to have been given in the Court below ; and by the 8th, the Court of appeal shall have power to adjudge payment of costs, and to order restitution, and they shall have the

same powers as the Court of error in respect of awarding process and otherwise.


If the Chief Baron and Barons of the Exchequer had power given them by the statute to make enactments to the effect just stated, then, no doubt, the appeal lies, and we ought to hear it. Each of the rules I have above quoted is a transcript of a provision in the Common Law Procedure Act of 1854; by sections 35, 36, 41, and 42 of which Act these powers are given to the House of Lords and the Court of Exchequer Chamber in all civil suits between subject and subject, including those that originate on the plea side of the Exchequer, as well as those originating in the Queen's Bench, Common Pleas, Common Pleas of Lancaster, and the other Courts of record to which the Common Law Procedure Act, 1854, applies; and if the true construction of the 22 & 23 Vict. c. 21, s. 26, is that the Lord Chief Baron and two or more Barons can apply any of the provisions of the Common Law Procedure Act, 1854, to all suits which originated on the revenue side of the Court of Exchequer at all stages, after the litigation has passed out of the Court of Exchequer, as well as whilst still in the Court of Exchequer, no doubt that power has been exercised. Certainly a power so extensive as this is not one which one would expect to find given to the Judges of any Court. The regulation of the process, practice, and mode of pleading in any Court involves a great many questions of detail, and therefore may properly be delegated by the legislature to some one; and when it is delegated at all, the power is naturally confided to the Judges of that Court. But it seems highly improbable that the legislature should intend to delegate to any one a discretionary power to determine whether the Exchequer Chamber and the House of Lords should or should not have a new jurisdiction which they had not before—to prescribe to the Exchequer Chamber and the House of Lords how they should exercise

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that jurisdiction—and to give to the Exchequer Chamber and the House of Lords new powers of awarding process to enforce this jurisdiction. Whether these things should be done or not is a question of principle, which the legislature ought to determine for itself. Still less likely is it that they would delegate this power to the Judges of one Court, to be exercised from time to time. It was perfectly competent for the legislature to do so; but before construing the Act in such a way as to produce this startling result, we ought to see the intention to do so pretty clearly expressed. Now section 26, in terms, gives power to the Barons to apply the provisions of the two Common Law Procedure Acts to the process, practice, and mode of pleading on the revenue side of the Court of Exchequer, with the purpose of making it, as nearly as may be, uniform with the process, practice, and mode of pleading on the plea side of the Court of Exchequer. These words seem to me to shew an intention to confine the power to the process, practice, and mode of pleading in that Court, and whilst the cause is before that Court. I do not think that in any fair and ordinary construction of language the judgment of the House of Lords, reversing or affirming the judgment of a Court below, or the award of process by the House for the purpose of enforcing their judgment, can be considered part of the process, or practice, or mode of pleading of that Court below. I think that it would be a great strain upon the words to construe them so as to include such matters in them; and, as I have already said, I think that it is so improbable that the legislature meant to include them in the power given to the Lord Chief Baron and the Barons, that the intention ought to be clearly shewn.

Hitherto I have only referred to the 26th section, and reasoned as to its construction from the terms of that section alone; but when we look at the whole Act of the 22 & 23 Vict. c. 21, and construe section 26 as a part of

the whole statute, I think that, according to the ordinary rules of construction of a statute, it becomes clear that the legislature did not intend to give the power of appeal in cases on the revenue side of the Exchequer.

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Before the Common Law Procedure Act of 1852, a writ of error might issue to remove the record of a cause in the Exchequer, whether it was on the plea side or the revenue side of that Court, and the Court of error might examine into any errors apparent on the record, but nothing else. In suits between subject and subject, a further power had been given to tender a bill of exceptions, and thereby to annex to the record a statement of the direction of the Judge to the jury, and thereby to bring any alleged misdirection before the Court of error; but that power had not been given in suits in which the Crown was a party, and consequently not in proceedings on the revenue side. The Act of 1852 made many alterations in the form of the writs of summons and execution, and other matters properly called process, and also in the practice and also in the mode of pleading; and it also contained a series of enactments, beginning with section 146, as to error, and the manner in which, after error has been brought, the proceedings are to be conducted in the Court of error. The Attorney General argued that because the preamble of the Act of 1852 recited that it was expedient that the process, practice, and mode of pleading of the superior Courts should be rendered more simple and speedy, therefore the enactments relating to error in that Act must relate to process, practice, or mode of pleading. I think Sir *Hugh Cairns* gave the true answer when he said that in all Acts were many provisions going beyond the scope of the preamble, which merely pointed out the principal object of the legislature. The Attorney General also argued that there was a necessity for the more extensive construction of section 26, in order to carry into effect the provisions as to the mode of proceeding in error. I think this

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is not so. In the 22 & 23 Vict. c. 22, by section 18 the legislature makes an enactment equivalent to sections 146 and 147 of the Common Law Procedure Act of 1852; but when they come to section 148, there is a difference made, which I think is very important. By the Common Law Procedure Act, 1852, section 148, it is provided that "a writ of error shall not be necessary or used in any cause, and the proceeding in error shall be a step in the cause, and shall be taken in manner *hereinafter mentioned*." The 19th section of the 22 & 23 Vict. is in the same precise words till it comes to the manner in which error shall be taken, that is, to be "in manner and subject *as*" (a word I presume inserted by a clerical error) "to such terms and conditions as to giving bail or security as may be directed by any rule or order made by the Barons under this or any other Act," &c. It seems to me that the express power here given to the Barons to regulate by rule the manner in which error shall be taken, not only puts an end to the last mentioned argument of the Attorney General, but also affords a strong argument that the legislature did not suppose that the power to do so was included in the power given by section 26. Again, the Common Law Procedure Act of 1854, by section 32, allowed error to be brought upon a special case. The legislature, in the 22 & 23 Vict. c. 21, sect. 10, enacts the same thing in so many words; and in section 20 the power to tender a bill of exceptions is expressly given. We find the legislature providing by express enactment for error on a special case, for making error a step in the cause, and for a bill of exceptions. The power of appeal was created by the Act of 1854, section 35, and those following it; it is a different kind of proceeding from error, and it is nowhere expressly mentioned in the 22 & 23 Vict. c. 21.

There were four matters, and, so far as I know, only four, in which the mode of questioning in a Court of error the decision of the Exchequer on a matter arising on the

plea side, differed from the mode of questioning its decision on a matter arising on the revenue side. When the legislature expressly enacts that three of those shall apply to the revenue side, it seems to me to afford a strong argument that the legislature did not intend the fourth, namely, the power of appeal, to apply to them. *Expressio unius est exclusio alterius*. Surely the spirit of that maxim applies here. It was said by the Attorney General, when pressed by this argument, that it might be that the legislature thought it quite certain that error on a special case was expedient, and therefore enacted expressly that it should be, but that they were not sure whether the power of appeal would be expedient, and so delegated to the Lord Chief Baron and the Barons the power to determine that for them. Such humility on the part of the legislature as this, amounting to an admission of their incompetency to determine a point, not of detail but of principle, is conceivable; but I cannot think it so probable as to justify me in straining the words of section 26 out of their ordinary sense, for the purpose of making them express such humility. It seems to me that a far more natural solution is afforded by what my brother *Bramwell* stated in the Court below (a), that "the officers of the revenue thought that the power of appeal was inexpedient." It has been assumed rather hastily, both in the Court of Exchequer and in this Court, that this was an unreasonable thought, and that when it was determined that a bill of exceptions might be tendered, it ought to have followed, as of course, that an appeal should be given. But it is to be recollected that revenue cases are confined to the Court of Exchequer, and that consequently the members of that Court acquire an experience not possessed by the


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(a) On the motion of the Attorney General, on the 4th Nov. 1863, to apply the Common Law

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Judges of the other Courts; but the trials at nisi prius on circuit are now before any Judges. It might, therefore, be reasonably expected that the comparatively inexperienced judge would readily reserve points for the more competent tribunal; and it might be thought, that if an appeal were given wherever a point was reserved, there would be delay and vexatious litigation, to the detriment of the revenue. Consistently with this, it might be thought that a bill of exceptions would seldom be tendered, except on some point on which the opinion of the Court of Exchequer was already known, and which was of importance. I do not say that these suggestions are good, but only that they are plausible enough to make it far from improbable that the officers of the revenue had influence enough to cause the bill to be prepared with the deliberate intention not to give the power of appeal. However this may be, I think, for the reasons I have given, that the true legal construction of the Act is, not to give that power.

Entertaining this view of the law, I am bound (with whatever regret as to this particular case) to say, that I think that this Court ought not to hear the appeal. I think, however, that we ought not to do anything which can in the least impede the taking of this appeal to the House of Lords. I think our judgment should be that the appeal be dismissed. If the Attorney General is right in saying that we are bound to give the judgment which the Court of Exchequer ought to have given, the judgment I propose would be erroneous, and on appeal the House of Lords would set it right, (as on that supposition, the House would be bound to do,) and pronounce the judgment which this Court ought to have pronounced.

WILLES, J.—I am of opinion that an appeal well lies in this case, and that the present appeal ought not to be dismissed. Of course, for the purpose of founding any

proceeding by way of appeal against the judgment of one of the superior Courts of law at Westminster, it is necessary to produce statutory authority; and I am of opinion that there is statutory authority for this appeal in the 26th section of the 22 & 23 Vict. c. 21, and for the action which the Barons of the Court of Exchequer have taken upon that section by making the rule extending the power of appeal granted between subject and subject in the Common Law Procedure Act of 1854, to cases on the revenue side of the Court of Exchequer as between the Crown and the subject. Of course this question depends altogether upon the construction of that 26th section; and many objections have been taken to applying it to the support of the rule made in the Court of Exchequer in the present case.

With respect to the objection that that rule, so construed, would be a delegation of legislative authority, I think that must fail in the mind of any one who considers the numerous instances of a similar delegation within the experience of us all. The course of pleading, for instance, in the Courts which I may call Courts of first instance, was always considered to be as much a part of the law of the land as any substantive rule for determining a right of property or any other right; and it was always held that such a law could not be changed without the authority of Parliament, and yet the noble and learned framer of the Act known as Parke's Act, the 3 & 4 Wm. 4, c. 42, conferred upon the Judges the power in effect of legislating with respect to such a portion of the law of the land. It is true that the power given in that Act was subject to the rules being laid for a certain period before Parliament. But inasmuch as Parliament, without the Crown, could not make a law,—inasmuch as Parliament constitutionally could not give its assent to an Act of Parliament simply by having the paper upon which the Bill was written or printed laid before it

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and inasmuch as in form and substance the assent of the Crown could only be given when both Houses of Parliament were present, in effect the power of legislating was given to the Judges with respect to such portion of the law. I conceive that the right of appeal is no more important a part of the law (and, indeed, it is less important because it is resorted to in rare cases), than the form of proceedings which take place every day in the superior Courts, and by means of which the rights of subjects are ascertained and enforced. Now after referring to such an instance as that, one is almost ashamed to refer to the numerous cases in which towns and other local communities are allowed to determine by the voice of a majority whether certain acts of parliament for local government shall or shall not have power within the limits in which the inhabitants reside, and to make amends for referring to such an instance, I shall content myself, for a proof that the delegation of legislative power is no objection, with referring to the 228th section of the Common Law Procedure Act of 1852, by which her Majesty in Council was authorized to direct that all or any part of that act of parliament, making very great changes indeed in the law, should apply to all or any Court or Courts of record in England or Wales, and that without any authority of the House of Lords or the House of Commons.

So much with respect to the delegation of legislative power. I shall now turn to the section itself, and endeavour to ascertain whether that section does delegate to the Barons of the Exchequer the power of making such a rule as they have made in the present case. I am of opinion that it does. Assuming that there is nothing in the objection that parliament cannot delegate its authority to this extent (in which I think it is proved that there is nothing, having in view the instances of the exertion of such a power to which I have referred), is there a delegation of such a power as has been exercised in the present case? At this stage of the

argument I am entitled to assume, as was put by the Attorney General in his argument, that instead of delegating the power to the Court of Exchequer, and the Court of Exchequer exercising such power, the legislature had made this enactment themselves; and then all I have further to do is to see whether the 26th section is large enough to cover the extent of the rule made by the Court of Exchequer in terms, assuming such a rule to have been made in the form of an enactment by the legislature itself. Now, for the purpose of testing that, I must strike out the word "any," "any of the provisions of the Common Law Procedure Act, 1852, and the Common Law Procedure Act, 1854," and I must read "such of the provisions of the Common Law Procedure Act, 1852," and so on, and I must strike out "as may seem to them expedient;"—because I am now assuming that it appears to the legislature to be proper—as are proper for making the process, practice, and mode of pleading on the revenue side of the Court of Exchequer the same as that on the plea side. Then, if the enactment be "to extend, apply, and adapt such of the provisions of the Common Law Procedure Act of 1854," which is the Act with which we are dealing, as are proper for making the process, practice, and mode of pleading on the revenue side of the said Court as nearly as may be uniform with the practice, process, and mode of pleading on the plea side of such Court,—to deal with such an enactment, all you have to do is to ascertain whether the process, practice, and mode of pleading on the revenue side of the Court do include proceedings by way of appeal on that side of that Court. I own that upon the best consideration which I can give to the matter I am of opinion that they do, not only from one's experience with respect to the practice of the Court, which has always been considered to include error and now appeal, but also upon

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the terms and out of the enactments of this Act itself. First of all with regard to the experience of us all with respect to practice, for of course the mode of pleading is out of the question; and I pass over process, because it has a technical meaning, such as has been put upon it in Comyn's Digest, title "Process." It relates to writs, either original or judicial writs of mesne process, or writs of execution; and I, therefore, do not place any reliance upon the use of the word "process;" but coming to "practice,"—"practice" is not a term of art. "Practice" is a word applying to all the proceedings by which a cause is brought to judgment and execution; and it is impossible to dispose of the subject of the practice of the Court without disposing of all the steps which may be taken before the judgment of the Court is carried into execution. And accordingly, looking at the question as a popular or as a professional one, if I take up any of the recognised books of practice of these Courts, I find that one of the heads in such a work will be the head of "error." Error will be considered, and now, since the recent alterations, appeal will be considered; otherwise such a word would be, as it were, maimed of an arm or a leg. A member of the practice of the Court is the proceeding by which the judgment of the Court may be stayed, and the execution of the Court put off until it is determined whether the judgment pronounced by the Court is right or not. The understanding to be gathered from works with respect to practice is this, that a proceeding by way of error or appeal is part of the practice on the side of the Court in which the process originates. I think it necessarily must be so now, because we are all aware that as a rule no Court possesses any jurisdiction over the subjects of the Queen without the writ of the Queen. Neither this Court nor the Court of Exchequer has any power to proceed, unless upon the express authority of an act of parliament,

without the process of the Queen; and accordingly the jurisdiction of Courts of error, before which appeals were formerly brought exclusively, was initiated by the Queen's writ of error out of Chancery. That is abolished, and the only process under which the Court acts now, from the beginning to the end of any proceeding, is a process which is sued out in the Court of first instance, the execution or the stay of execution of which process is the object, of course, of every proceeding in error in any cause. In modern times, an appeal has been substituted, as being found more convenient than a writ of error. The appeal takes the place of the writ of error, and indeed, more peculiarly, "appeal" is a proceeding in the Court below, upon whichever side the process is commenced. There is no record in the Court of appeal; the appeal is a mere information without any formal process to the Court which is substituted for the first Court, of what has taken place there, with a view to have a decision without being hampered by the technical forms which affect the proceeding in error. So much with respect to the meaning of the word "practice," as understood in the profession.

With respect to the Act itself, I apprehend that, as was suggested on Saturday by my brother *Williams*, this 26th section is framed with express reference to the amendments in the law introduced by the Common Law Procedure Acts. As already pointed out, the first Common Law Procedure Act was founded upon the report of a commission to improve the process, practice and mode of proceeding in the Courts of common law at Westminster. The recital of the Act is that such was its object, and its only object; and that Act includes proceedings in error. The second and third Common Law Procedure Acts followed. The second Act is headed, "An Act for the further amendment of the

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process, practice and mode of pleading in, and enlarging the jurisdiction." I need hardly observe that that latter clause applied only to the attempt which was made, and made to a great extent unsuccessfully, by the framers of those two statutes, to extend to the common law Courts an equitable jurisdiction, and that it had nothing whatever to do with the proceedings in error or appeal. In truth, appeal was not an extension of jurisdiction, but only the substitution of a more convenient mode of obtaining the opinion of a superior Court. And unless the legislature is to be considered as having stultified itself in the first Common Law Procedure Act, by reciting an improvement in the practice of the Courts, and then proceeding to make various enactments with respect to error, not only affecting the Courts of first instance, but affecting the Courts of error also, and touching even the powers and jurisdiction of the House of Lords, I am at a loss to see why "practice" in the 26th section should not be construed to extend to the mode of taking the opinion of the Court of error on appeal before the execution issues from the Court in which the proceedings commenced. And I apprehend that that is quite as much a part of the practice of the Court of first instance as is, in the case of these revenue proceedings, the trial of the issues arising on a record out of the Court of Exchequer in the Court of nisi prius at the assizes, which we all know is a Court whose jurisdiction is created in as different a manner, and is in itself in every way as distinct from the Court at Westminster as is the Court of Exchequer Chamber, or the Court of appeal.

It is said, however, that this construction is excluded by certain clauses of the Act; and it is said that it is excluded by the fact of the legislature having given in certain cases a right of error and appeal, and having omitted the case in question, and by the supposed absurdity of the legislature intending

to give a right of appeal in a case which it has not expressly mentioned. I apprehend, with the greatest deference to those who are of that opinion (and nobody has better learned how necessary and how just that deference is than myself), that that argument may be retorted with double force upon those who assert that the right of appeal in this particular case is excluded by a right of appeal being given in the cases mentioned in the Act. Because not only will this be found to be a case of appeal, *ejusdem generis*, but it will be found that the cases in which appeal is granted by the legislature, first of all, are cases in which the special interference of the legislature was necessary; because under the 26th section such a power could not have been given; and, secondly, that at least one of those cases of appeal is a peculiar one, and belonging to the revenue jurisdiction only. Now I may at once refer, in support of that suggestion, to the 15th section. That section gives an appeal in a case in which an appeal was never known before;—not even known in those Courts to which the Act of 1854 in terms applied, because it gave an appeal upon a rule. It is unnecessary that I should say more than that, or go into any discussion of the form of proceeding under which the Court of Exchequer has revenue jurisdiction upon a rule. It is a summary process without a writ, and it is enough to say that it is a case in which no appeal had ever previously been allowed; and therefore an appeal was granted, and granted distinctly in a case which goes far beyond any that was contemplated in the Act of 1854. I rather collect from that that the legislature thought that appeal was a remedy which should be extended and enlarged. With regard to the other cases in which an appeal might lie under the Common Law Procedure Act, the first of them is to be found provided for in the 22 & 23 Vict. c. 21, s. 10, where I observe that the Attorney General is included under the

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general expression of "the parties." That gives an appeal upon a special case agreed to between the parties including the Attorney General, on behalf of the Crown. In such a case no intervention of the Court was necessary. The Crown is sufficiently protected by the Attorney General having the power of preventing such an appeal by refusing to give his consent to the special case upon which it might be brought. The 17th section is a very remarkable one, as it appears to me, because before that statute, up to the Act of the 2 & 3 of the Queen, c. 22, no cause out of the Exchequer could have been tried at nisi prius without a commission. That Act abolished a commission in all cases between subject and subject. This Act, by the 17th section, reduces the Crown to the same condition as the subject in that respect; and it allows the justices of assize a distinct Court from the Court of Exchequer to try revenue cases without any commission. The 19th section is one which requires a remark. It is the section abolishing a writ of error; and then it goes on to enact that "the proceeding in error shall be a step in the cause, and shall be taken in manner and subject as to such terms and conditions as to giving bail or security as may be directed by any rule or order made by the Barons." Why? Because the provisions of the Common Law Procedure Act, following the statutes of Jac. 1 and Car. 2, were not applicable to the case of the Attorney General; because it was thought, no doubt, an absurdity that the Attorney General should enter into a recognizance, or that any security should be given by him; and accordingly it was necessary that there should be rules by which the law applicable to parties should be modified; and that to me seems quite a sufficient reason why this provision as to the abolishing of a writ of error should be specially introduced into the Act. And, moreover, I think, with reference to the 27th section, that such a section as

the 19th was necessary, because it enacts that "new or altered writs and forms of proceeding" shall be framed by the Barons, but it does not give the Barons a power which would include the abolishing of the Queen's writ of error. The introduction of the 19th section appears to me to be fully explained in that way.

Then comes the section with respect to a bill of exceptions; and that, of course, was necessary, because the right to a bill of exceptions is founded upon the Statute of Westminster the Second, and not upon the first or second Common Law Procedure Act, and therefore an express section was necessary. This being so explained, I apprehend that the introduction of such an enactment by the legislature strongly fortifies the position which I take, because it shews that the legislature intended to put the Crown in the same condition as the subject in every respect in which that course could be taken.

But now comes the question of an appeal upon a rule for a new trial, which may be without the leave of the Court when it is divided, and without the leave of the Attorney General. Why should that discretion be vested in the Barons of the Court of Exchequer, and why should it be for them to say that appeal should lie in such a case? I own that I see no difficulty in answering that question, because I conceive that the appeal upon a special case after the argument of a new trial is only a more convenient mode of raising a question which could have been raised upon a bill of exceptions. Am I right in saying that you could raise under a bill of exceptions the sort of question which is desired, so far as I can judge from the proceeding, to be raised here? I am of opinion that you can. It is said ordinarily that you cannot, except to non-direction; that is to say, to the Judge not having directed upon a particular point. That is so, ordinarily, no doubt, and if

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it were not so, a Judge could never select the point which he perceives to be the only real one in dispute, and leave that alone to the jury, disembarassing their minds of that which has become immaterial for them to consider, because it has either expressly or tacitly been admitted. Such was the ruling of the House of Lords in a case which is cited so frequently, the case of *Anderson v. Fitzgerald* (4 House of Lords, 484). But it would be quite a mistake to suppose that if a Judge, having omitted to state a proposition which ought to be stated in the affirmative or in the negative, states or omits to state a point of law to the jury, so as that they may be misled as to facts of the case, which it was material for them to consider, and counsel calls the attention of the Court to that omission, and the judge declines to correct the impression which has been produced by the omission and by his silence upon the subject,—it would be a mistake, I repeat, to say that a bill of exceptions may not be tendered. In order to tender a bill of exceptions upon an omission, the counsel must call the attention of the Court to it, and it must be the omission of a direction in point of law which induces the jury to look to facts which they ought to consider as irrelevant, or to omit from their minds facts which they ought to consider important. And such was the opinion of the Judges in the recent case of *M'Mahon v. Leonard*, (6 House of Lords, 970). Mr. Justice *Wightman*, in delivering the opinion of the Judges in that case in the House of Lords (at page 996), so laid down the law, with the assent of all the Judges who were then present; and I repeat, therefore, that those points which may be taken at the trial by a bill of exceptions, if the exceptions are properly framed, may be taken, and none other that I know of, upon the argument of such an appeal. If the statute with respect to bills of exceptions had directed, as we know it does in one part of the kingdom, that the

exceptions should first be argued before the Court of first instance, and should afterwards go to the Exchequer Chamber, this would be nothing more than, in substance, changing a proceeding by bill of exceptions, which is full of expense and technicality, into a simpler and more beneficial proceeding by way of appeal against the ruling of the Court upon a point which might have been raised at *nisi prius* upon a bill of exceptions.

The Court of Exchequer seems to me, therefore, in making this rule, to have been authorized by the 26th section, and to have kept strictly within its provisions; and the rule appears to me to be a rule with regard to the practice of the Court, and not exceeding the jurisdiction of the revenue side which the legislature intended to confer upon the Court of Exchequer, to which exclusively are confided those complicated and unusual cases, proceedings *in rem*,—raising questions that would not arise between subject and subject in the other Courts. I think this appeal is competent, and that we ought to proceed.

CROMPTON, J.—The question before us in this case is, whether the Chief Baron and three Barons of the Court of Exchequer had authority, by a general rule made by them under the 26th section of the Queen's Remembrancer's Act, to give to parties litigant on the revenue side of the Exchequer an appeal against the decision of the Court upon a rule for a new trial upon matter of law arising at the trial. It was not contended on the part of the Crown that any such appeal existed independently of that statute; nor was it, nor could it be, pretended that such right of appeal was directly given to the parties by that statute, which regulates proceedings in error, and gives in distinct and express terms the right of appeal in several cases where the legislature thinks it ought to exist. The Attorney General was, there-

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fore, obliged to insist upon a supposed delegation to the Barons of the power of creating such appeal by virtue of the 26th section of the Act. No doubt the legislature might, had it so pleased, have given such a power of creating such appeal to this Court, and ultimately to the House of Lords; but it certainly would be a new and unusual course of legislation, in creating a new statutory appeal. Parliament has frequently delegated powers of making rules as to pleading and practice, and has authorized persons interested in particular localities to adopt the provisions of particular acts of parliament; but, as far as I know, this is the first time that a power of creating an appeal has been entrusted, if it has been entrusted, to the Court from whose decision the appeal is to be; and the general rule that an appeal, the creature of a statute, must be very distinctly and unequivocally given, seems to me to apply still more strongly to the supposed power of creating such appeal. I cannot think that the power of creating such an appeal is given to the Barons by the 26th section. In the earlier parts of the Act, provision is distinctly and expressly made for creating appeals in some cases, and for regulations as to the matters of error and appeal, where the legislature thought that such appeals should be made, and that such regulations were desirable; and in giving such appeals, and making such regulations, and in introducing such provisions of the Procedure Acts, and in making them applicable to cases on the revenue side of the Exchequer, they seem carefully to have abstained from giving the right of appeal from decisions of the Court on motion, although such right of appeal is given expressly by the Procedure Act of 1854 in civil cases in the same set of clauses from which they selected some for giving rights of appeal in other cases. The legislature may possibly have thought it better not to give so much facility to appeals in cases for the breach of customs and excise laws as might operate as a

temptation to parties to bring forward appeals, in many cases for the purpose of delay and vexation, especially when the Court peculiarly conversant with revenue matters had decided upon them. They certainly appear to have abstained, probably upon some such ground, from inserting provisions for such an appeal where we should have expected them to be found, if so intended; and this makes me think it the less likely that they would delegate the power of creating such appeal to the Barons.

It was contended that the legislature, by the use of the words "process, practice and mode of pleading" in the 26th section, must be taken to include the right to appeal, as those words are used in the preamble and in other parts of the Procedure Acts, and that as the later Procedure Act contains provisions for appeals on motions, the words in question must be taken to have a statutory meaning, and to include therein such right to appeal, and that such right is either process, practice, or mode of pleading, when used in the subsequent Act. I agree, however, with Sir *Hugh Cairns*, that it would be a very unsafe construction to infer from the preamble or recital of a statute that it contains all which the statute refers to, and that it contains nothing more than what may be said to be included in the recital or preamble. As observed by Sir *Hugh Cairns*, it may contain all that is in the recital and preamble, and something more, as a right to a new statutory appeal. It seems to me that the 26th section refers to process, practice, and mode of pleading in the ordinary sense of those words, and that they cannot fairly be construed as intended to include the right of appeal, especially in a statute where various rights of appeal are given before by express words. The words following the first branch of the section give power "from time to time by any such rule or order to extend, apply, or adapt any of the provisions of the

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Procedure Acts, and any of the rules of pleading and practice on the plea side of the Court, to the revenue side of the Court;" but this general power is qualified by words plainly applicable to the whole of the preceding powers as to adapting the provisions of the Procedure Act. Those words are: "as may seem to them expedient for making the process, practice, and mode of pleading on the revenue side of the said Court as nearly as may be uniform with the process, practice, and mode of pleading on the plea side of such Court."

The whole section seems to me clearly intended to give powers to make rules respecting process, practice, and pleading. It is analogous to the provision in many cases for Courts to make rules as to their own process, practice, and pleading. It refers to the rules of pleading and practice, and, as I think, to the provisions of the Procedure Act, so far as relates to process, practice, and pleading. The words "from time to time" appear to apply to cases like those where the Courts are empowered to make rules for the purposes of pleadings, amendments, time for pleading, writs, processes, and the like, and not to be so applicable to the case of giving a new right of appeal,—which, I agree with the Attorney General, could hardly be intended to be given one day, and taken away or altered on another, as might well be the case with mere rules of practice or pleading, which might be found inconvenient and altered again.

Another argument urged upon us was, that as the bill of exceptions was given by the Act, the appeal on motion was only a new kind of practice and mode of obtaining the same result. I cannot think that the giving a bill of exceptions to correct a mistake made at the trial by a single Judge, who may by the Act in question be the Judge of another Court, is at all the same thing as giving an appeal against

the decision on motion of the Court particularly conversant with matters of revenue; and though in many cases a question of law might be raised in both methods, they would be raised with very different incidents to the parties. The bill of exceptions which could formerly be used only on writ of error, and since the Procedure Acts can only be used on suggestion of error, is an expensive and troublesome remedy seldom resorted to, except on important and fitting occasions; and it may well be that the legislature has given that remedy, and purposely abstained from encouraging appeals in the smaller matters of the breach of the excise and customs laws, which so frequently come before the Court of Exchequer. There certainly has been some ground for complaining of the number of appeals which have been brought under the provisions of the Procedure Act from decisions upon motions in the common law Courts; and, from what passed in the Court below, there seems to have been some fear of the consequences of extending this provision to proceedings on the revenue side. It is sufficient, in my mind, as to this argument, to say that the bill of exceptions and the new appeal from decisions on motions is not the same remedy; nor can the one, I think, be fairly treated as process or practice by which to carry out the other.

I think that the words process, practice, and pleading, in the 26th section, cannot, without great straining, be construed as delegating the power of creating a right to appeal. The right of appeal can hardly be "process or pleading;" and as to the word "practice," I cannot help thinking that there is a great difference between the machinery of the appeal and the right of appeal. The former might with less difficulty be called "practice," but I have great difficulty in seeing how the giving a right to appeal is "practice."

The power given to eight Judges to make pleading and

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practice rules in ordinary actions could never have been imagined to give any power of creating an appeal; and it seems to me, from the reference in the Queen's Remembrancer's Act, section 26, to those prior rules, and from the qualifications limiting the power of adopting the provisions of the former Acts to the purposes of practice, pleading, and process, and from the other reasons I have referred to, that I cannot say that the legislature has, by the 26th section, delegated to the Barons any such power as that contended for.

I think, therefore, that there is no right to appeal from the decision on motions of the Court of Exchequer in cases on the revenue side of that Court, and consequently that we have no jurisdiction to interfere with the decision of the Court of Exchequer in the present case.

I agree with my brothers *Blackburn* and *Mellor* that if we are wrong our error may be set right by the House of Lords, who, if they are bound by the rule of Court of the Barons, are directed by the same rule to give the judgment that we ought to have given.

WILLIAMS, J.—I am of opinion that we ought to hear this appeal; because I think the Barons of the Exchequer had power, under the statute 22 & 23 Vict. c. 21, s. 26, to make the order, which they have made, extending to the revenue side of their Court, the provisions contained in the 35th and 36th sections of the Common Law Procedure Act, 1854.

The 26th section of the former of these statutes authorizes the Barons by their order "to extend and apply or adapt any of the provisions of the Common Law Procedure Acts, &c., to the revenue side of the said Court, as may seem to them expedient for making the process, practice, and mode of pleading on the revenue side of the said Court as nearly as may be uniform with the process, practice, and mode of pleading on the plea side of such Court."

It cannot be controverted that if this section confers on the Barons a general power to extend such of the provisions of the Common Law Procedure Acts, as they think proper, to the revenue side of the Court, all question ceases. But it is argued that the language of the section confines the extension to such provisions of the Common Law Procedure Acts as relate to proceedings in the Court of Exchequer itself, and does not allow of the application of such of those provisions as relate to appeals to the Exchequer Chamber and the House of Lords, which it is said are foreign to the Court of Exchequer, and are not part of its "process, practice, or mode of pleading."

But it should be observed that the proceedings in error, generally speaking, are not regulated by any rules of the Courts of error themselves; but by the "*Regulæ Generales*" of the superior Courts at Westminster out of which the proceedings in error come. And this appears to shew that proceedings in Courts of error by way of appeal may well be regarded as part of the practice of those Courts respectively. It may further be remarked that the phrase "process, practice, and mode of pleading" is a familiar phrase, which the legislature appears to have purposely used as one of well known signification. It was, I believe, first employed when the Commissioners were appointed to inquire into the "process, practice, and pleading of the superior Courts of law at Westminster;" and afterwards in the preamble of the Common Law Procedure Act, 1852; and again in the title of the Common Law Procedure Act, 1854; and lastly in the title and preamble of the Common Law Procedure Act, 1860. But in accomplishing the great work of rendering more simple and speedy "the process, practice, and mode of pleading in the superior Courts at Westminster," it was not thought to be going beyond that

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purpose to reform and simplify the "proceedings in Courts of error."

None of the wholesome enactments, however, contained in these statutes extended to the revenue side of the Court of Exchequer until the passing of the statute the 22 & 23 Vict. c. 21, now in question. And looking at the clauses in this statute which were introduced for that purpose, it appears to me plain that they were framed with reference to the anomalous character of suits and proceedings in that branch of the Court. Their nature is so peculiar that the legislature appears to have deemed it inexpedient to enact generally that the Common Law Procedure Acts shall apply to the revenue side as well as the plea side. Accordingly, some of their reforms, which are unquestionably beneficial, are at once applied. For example, by section 9, the general power of amendment given by the 22nd section of the Common Law Procedure Act is expressly extended to the revenue side. Again, by section 10, the improvements as to the stating of special cases, and bringing error thereon, are also expressly applied at once. Again, by sections 18, 19, and 20, certain other of the provisions of the Common Law Procedure Act, as to the propriety of the application of which no doubt could be entertained, are at once and absolutely extended to the revenue side; but as to the rest, the statute leaves it to the discretion of the Barons, as being best able to judge of the expediency to extend to the revenue side so many of the provisions of the Common Law Procedure Acts as they think right, in order to carry into effect the declared purpose of uniformity.

It has been objected that, if the statute meant to give the right of appeal, it would have said so expressly; but this would be to deprive the Barons of the discretion which, in my opinion, the statute meant to confer on them, as to

adopting this provision of the Common Law Procedure Act. Nor should we, in hearing this appeal, violate the rule that an appeal never lies unless it is given by statute, because it is so given if the statute in question authorizes the Barons to extend the enactment which confers the right; and being of opinion, for the reasons I have given, that proceedings in error and by way of appeal are part of the practice of the Court below, within the meaning of that statute, I think the legislature confers the right of appeal in this case.

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ERLE, C. J.—Upon this motion to dismiss the appeal, the question has been, whether the Barons of the Exchequer had jurisdiction to order that the following provisions of the Common Law Procedure Act, 1854, should be applied to the revenue side of the Court of Exchequer; namely, that an appeal, with its ordinary incidents, should lie to the Exchequer Chamber and the House of Lords, where a rule for a new trial on the ground of misdirection by a Judge has been discharged. In my opinion the answer to this question should be in the affirmative; that there was jurisdiction, on the ground that the Queen's Remembrancer's Act, the 22 & 23 Vict. c. 21, s. 26, gave to them the power to make that order.

In support of this opinion, I proceed to consider that statute, together with the state of the law which led to its passing. And first I would premise that procedure in a suit includes the whole course of practice, from the issuing of the first process by which the suitors are brought before the Court to the execution of the last process on the final judgment; and throughout the Common Law Procedure Acts and this Act "procedure" is used as equivalent to "process, practice, and mode of pleading." Procedure in civil suits in the superior Courts of common law received

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memorable improvement by the Common Law Procedure Acts, 1852 and 1854. Those Acts are declared, in the preamble of the first and the title of the second, to be for the amendment of process, practice, and mode of pleading in the superior Courts. Those Acts provide that each suit, from the issuing of the first to the execution of the last process, should be taken to be one entirety. They contain provisions for the practice to be followed in obtaining redress for erroneous judgments by appeal to the Exchequer Chamber and the House of Lords, the writ of error being abolished, and proceedings in error being declared to be steps in the cause by the Common Law Procedure Act, 1852, section 148. Appeal is very essential for maintaining the right administration of law, and careful provisions are made to give the use and prevent the abuse of the right of appeal. According to those provisions the appeal is effected by the act of the suitor in the Court of first instance, delivering a memorandum to the officer of the Court without writ or other authority, and the right to deliver that memorandum is vested in him in his capacity of suitor, derived from the first process in the suit. That memorandum, so delivered, if the rules of practice are complied with, compels the officer of the Court below to bring the record into this Court and into the House of Lords, and may compel each of those higher Courts to hear his appeal against the judgment entered on the roll of the Court below, so brought by that officer into the higher Courts; and he is to record thereon the judgment of those higher Courts, and then to take back that judgment to the Court below, as the judgment in that suit to be executed by that Court, according to the practice thereof. The provisions are ample for the practical guidance of the suitor in carrying his appeal through each Court, and they are clear to shew that each Court of appeal has no other functions than to fix the time for hearing the

case; neither Court can interfere with the record, or do any effective act but hear and determine on the judgment to be pronounced. The whole of these provisions in the Common Law Procedure Acts are constantly described as relating to "process, practice and mode of pleading," and they extended to the plea side of the Court of Exchequer, but not to the revenue side of that Court. And this brings me to the passing of the statute above mentioned, the 22 & 23 Vict. c. 21, under which the Barons claimed to make this order. I assume that the procedure on the revenue side of the Exchequer was adapted to usages now obsolete, and so was in need of being amended; also that the legislature intended to adopt this amended procedure of the Common Law Procedure Acts, as being consonant to the interests of truth and justice, reserving no privileges to the Crown as a suitor against a subject inconsistent with those interests. I would also refer to the rule that the rights of the Crown cannot be taken away without clear words of enactment, as explaining the insertion of some of the sections in this Act.

But to come to the statute itself. The preamble recites the expediency of making provision in relation to the procedure on the revenue side of the Court; then several sections, adapting the spirit of the Common Law Procedure Acts to matters of revenue, contain provisions suited to the intended change of procedure. Those which seem to me relevant to the matter now in hand are as follow. Section 9 gives full power to amend all defects of form. Section 10, to state a special case, and bring error thereon. Sections 12 and 13, in case of appeal to the Exchequer from the assessment of the Commissioners relating to succession duty, give power to appeal from the Exchequer to the two higher Courts. Section 15, in case of a suit for succession duty, enables the Court to refer the matter to a Master, and

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to take his report as a special case, and error to be brought thereon. Section 17 empowers the Judges of Assize to try issues on the revenue side as on the plea side. Section 19 makes proceedings in error to be a step in the cause, without writ of error, to be taken in manner as may be directed by any order made by the Barons under this or any other Act. Section 20 gives power to tender a bill of exceptions on trial of issues from the revenue side; and section 21, to give costs for and against the Crown. We then come to section 26, which gives large powers for making orders. It contains two distinct clauses; by the first clause the Barons are empowered from time to time to make all such orders as to "process, practice and mode of proceeding on the revenue side, and for the effectual execution of this Act, and the intention and objects thereof, as may seem to them necessary and proper;" and by the second clause, "also from time to time by such order to extend, apply, or adapt any of the provisions of the Common Law Procedure Act, 1852, and of the Common Law Procedure Act, 1854, and any of the rules of pleading and practice on the plea side of the Court, to the revenue side, as may seem expedient for making the process, practice and mode of pleading on the revenue side as nearly as may be uniform with the process, practice, and mode of pleading on the plea side of the Court." I have referred to several sections creating specific appeals. For all of these appeals, both to the Exchequer Chamber and to the House of Lords, the Barons must make order under section 26, when making orders as to process, practice, and mode of pleading on the revenue side; for if they did not do so, the effectual execution of the Act would be prevented. Section 19, relating to proceedings in error, seems to me to refer expressly for the practice in those proceedings to the orders to be made by the Barons under section 26. It refers to

orders to be made under this Act; and section 26 is the section which empowers them to make the required orders. If this view of the effect of the statute be correct, it is certain that the power of the Barons to make orders as to the process, practice and mode of pleading on the revenue side was not confined to the Court of Exchequer, but extended to the Courts of error, into which suits should be brought from the revenue side of the Court of Exchequer.

It may also be worth noting that, under section 26, the Barons must make orders for the practice on the appeals under sections 10 and 12 above referred to, as the appeal is created by the name "appeal," and no specific procedure is created. The first clause of section 26 gives very ample powers; but the 2nd clause is that which is more immediately applicable to the order in question. It empowers the Barons, *inter alia*, to apply any of the provisions of the Common Law Procedure Act, 1854, to the revenue side, as may seem expedient for making the procedure on the revenue side as nearly as may be uniform with the procedure on the plea side. The order in question applies section 35, which is one of the provisions of the Common Law Procedure Act of 1854, to the procedure on the revenue side. The Barons are directed to make that procedure uniform with the procedure on the plea side. Section 35 is part of the procedure which is in use on the plea side; and the Barons, therefore, are not only empowered, but required, to make an order for applying it, if they are to make the procedure on the two sides uniform, and if they think it expedient. The order of the Barons seems to me, therefore, to be supported by the words of section 26, and to accord with the intention to be collected from the context.

The objections on which Sir *Hugh Cairns* relied to prove want of jurisdiction depend on the construction of section

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26: and if the construction above stated is right, it follows that his objections fail. Against that construction he pressed two principal arguments, as I understood him; first, that the order which the Barons were empowered to make was intended to operate only on proceedings while in their own Court, and had no effect upon the Courts above; and secondly, that the said order, if valid, subjected suits to a ground of appeal which did not exist before. As to the first ground, I have already given my reasons for saying that procedure on the revenue side includes not only proceedings in the Court of first instance, but also those in the sequel of Courts through which the same suit may be carried by the suitor, and that power was given to the Barons over the whole of the procedure. The statute, in my opinion, delegated to them an authority to make orders; and all orders made within that authority have the same effect as the statute. It may well be that the legislature thought that the Barons of the Exchequer were best qualified to decide how far the collection of the revenue could be reconciled with the new rights proposed to be granted—rights which might be subject to abuse by dishonest debtors sued by the Crown. But my reasons for dissenting from this argument have been sufficiently explained.

With regard to the second objection, that the order, if valid, would subject suits to a ground of appeal which did not exist before, my answer is a denial of the fact. In my opinion, the order of the Barons did not create any new ground of appeal; the order applies section 35 of the Act of 1854 to the revenue side; and thereby, when a motion is made for a new trial on the ground that the Judge has not ruled according to law, that is, has misdirected, a party may have the decision on that motion reviewed in a Court of appeal. Before 1854, in case of misdirection by a Judge, a party aggrieved might seek redress either by tendering a

bill of exceptions, or by moving in banco for a new trial. Each remedy had its defects. The bill of exceptions, though a most salutary check against mistakes by Judges, was subject in practice to much expense, delay, complication, and other defects. The motion for a new trial had the defect of being final without appeal; and as the Court, according to usage, accepted the statement made by the Judge of the course he had taken at the trial, the suitor was often dissatisfied with the result. Section 35 introduced a salutary amendment of the practice, which was to be at the suitor's option in case of misdirection, by enabling him to appeal from the decision of the Court of first instance upon a motion for misdirection. By this amendment a bill of exceptions can only be needed when the suitor has a distrust of the Judge or of his Court. If there is mutual confidence the point can be reserved subject to appeal, and the suitor has facility for obtaining the judgment of each of the three Courts in their order. But on a bill of exceptions, the opinion of the Court in which the action is brought is not taken, and the proceeding is encumbered with the difficulties before referred to.

The 22 & 23 Vict. c. 21 enabled the party to tender a bill of exceptions in suits on the revenue side; it thereby enabled him to bring any complaint of misdirection before a Court of Appeal, the ground of appeal being misdirection, but the practice to be followed being bill of exceptions. The order in question left the ground of appeal precisely the same as it would have been under a bill of exceptions, but altered the practice to be followed in seeking redress. If the party, instead of tendering a bill of exceptions, moves for a new trial, he may bring the question of misdirection before the Court of Appeal under the order of the Barons. But it is still the same misdirection which might have been the subject of exception. The course for

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redress under a bill of exceptions would have been more circuitous; but still misdirection, and nothing but the misdirection which might have been an exception, can be the ground of appeal under the order in question. Thus it seems to me to be true that the order relates only to the practice to be followed in appealing on account of misdirection, and leaves the rights of the parties under the law in respect of misdirection as they were before, and in this sense did not create a new ground of appeal.

For these reasons, I am of opinion that the order in question is valid, and that this Court has jurisdiction to hear and determine this appeal.

COCKBURN, C. J.—After the best consideration I can give to this case, the only conclusion at which I can arrive is that we have no jurisdiction to entertain this appeal. The question depends upon whether by the 26th section of the 22nd and 23rd Victoria, chapter 21, “An Act to regulate the office of Queen’s Remembrancer, and to amend the practice and procedure on the Revenue side of the Court of Exchequer,” power is given to the latter Court to establish the proceeding by appeal on motions for new trial in revenue causes, and to give an appellate jurisdiction to the Court of Exchequer Chamber. The section first provides that “it shall be lawful for the Lord Chief Baron and two or more Barons of the Court of Exchequer from time to time to make all such rules and orders as to the process, practice, and mode of pleading on the revenue side of the Court, and as to the allowance of costs, and for the effectual execution of the Act, and the intention and objects thereof, as may seem to them necessary and proper.” It is admitted that this part of the section relates only to the procedure in revenue causes so long as a cause is pending in the Court of Exchequer itself. But the section

goes on to give power to the Barons "from time to time by any rule or order to extend, apply, or adapt any of the provisions of the Common Law Procedure Act, 1852, and the Common Law Procedure Act, 1854, and any of the rules of pleading and practice on the plea side of the said Court, to the revenue side of the said Court, as may seem to them expedient for making the process, practice, and mode of pleading on the revenue side of the said Court as nearly as may be uniform with the process, practice, and mode of pleading on the plea side of the said Court." The question is, whether the power of adapting the provisions of the Common Law Procedure Acts for the purpose of assimilating the procedure on the revenue side to that on the plea side of the Court, enables the Court of Exchequer to create for the first time an appellate jurisdiction in this Court in causes relating to the revenue.

It is, no doubt, true that the proceeding by appeal on motions for new trial is one of the provisions of the Common Law Procedure Act of 1854. But I cannot bring myself to think that, when the language of the 26th section of the 22 & 23 Vict. c. 21 is looked to, the application of this provision is within the scope of the authority conferred on the Barons of the Exchequer. Still less, when the other enactments of this statute are taken into account, does it seem to me possible to adopt that view.

It is admitted that the words, "process, practice, and mode of pleading on the revenue side of the Court," occurring in the first branch of the 26th section, apply only to the procedure of the Court itself, properly so called. It is not contended, in support of the jurisdiction, that under the power conferred by the first branch of the section, the Court would have had power to create a proceeding by appeal. Why, then, should the words be read differently when occurring in the second branch of the section? Be-

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sides which, independently of this argument, it appears to me that the term "process, practice, and mode of pleading on the revenue side of the Court," must be taken to have reference to the procedure of the Court while the cause is still pending within it, and cannot be taken, without a very forced construction of the language, to apply to the creating of an appellate jurisdiction, or to the procedure to be adopted when the cause has quitted the sphere and precincts of the inferior Court, and has passed into the jurisdiction of the appellate tribunal. It is true the process out of which the appeal emanates and springs is that of the Court below, as also that the record after the appeal has been disposed of returns to the Court out of which it came, in order that effect may there be given to the judgment. It is also true that in acts of parliament relating to the procedure of the superior Courts of common law, the term "process, practice, and mode of pleading" is applied to the procedure of Courts of error and appeal. But who, on an appeal in a civil suit, ever thought of speaking of the practice of the Court of Exchequer Chamber as the practice of either of the three Courts from which to its superior jurisdiction an appeal lies? In the Court of Exchequer, on a rule for a new trial, a plurality of counsel may be heard on the same side. In the Court of appeal we hear but one on each side. This is because our proceedings are here regulated by the practice of this Court, and not by that of the Court of Exchequer. Again, the time within which, according to the Common Law Procedure Acts, the appeal must be brought, the form in which it shall be brought before the Court, the awarding of process (as to which power is expressly given to the Court of appeal), all these are matters of practice, as to which, if special statutory enactments had not been made, the Court of appeal must have made rules to regulate its own proceedings. How can these matters

be said to appertain to the procedure on the revenue side of the Court of Exchequer? Yet these provisions as to the jurisdiction and procedure of this Court, the Court of Exchequer has taken upon itself to prescribe and settle as though it formed part of its own. The fundamental fallacy of the whole proceeding appears to me to consist in supposing that, because a cause commences on the revenue side of the Court of Exchequer, and in a certain sense may be said to be a cause in that Court, the practice and procedure of this Court is therefore to be a part of the practice and procedure of the Court of Exchequer. The revenue side of the Court of Exchequer is a separate and distinct Court; this Court of Exchequer Chamber is another. The practice and procedure of the one is not that of the other; and a power to amend the practice and procedure of the one is not, as it seems to me, a power to amend that of the other.

But can it be supposed, in the absence of clear legislative enactment, that parliament intended to confer on the Court of Exchequer the power of creating or withholding an appeal in matters of revenue at its pleasure and discretion? When, in the history of juridical legislation, was such a thing ever heard of as the legislature leaving it to a tribunal to decide whether its authority should be subject to revision and correction on appeal? No doubt; in order to prevent vexatious and frivolous appeals, the right to appeal may be made conditional on the permission of the Court; but no one ever heard of its being left to a Court to decide whether its authority should be generally subject to an appellate jurisdiction or not. Statutory power has been given to Courts to make rules and regulations as to procedure, but never to determine whether there should be a superior appellate Court. Is it conceivable that parliament would, in a matter of so much importance, and so

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eminently fitted for the determination of the legislature, have delegated its functions to a Court of law? It does not appear to me enough to say that by this Act the proceeding by bill of exceptions is allowed in revenue cases, and therefore the legislature might well intend to give power to the Court of Exchequer to superadd the proceeding by way of appeal. The obvious answer to such an argument is that, had such been the case, nothing would have been more easy than for parliament so to enact. A few short lines, and the matter would have been set at rest. But, besides this, there are material distinctions between the proceeding by bill of exceptions and that by appeal. The proceeding by appeal, consisting, as it does, of three stages, instead of two, is more likely to be resorted to for the purpose of delay. The case on which the appeal is to be brought must be stated between the parties, or, in case of disagreement, must be settled by the Court or a Judge. It may not have been deemed advisable to place the Crown in this position. I am warranted in thinking that the adoption of this mode of proceeding in revenue cases was deemed of doubtful expediency, from the fact that, though the Act of the 22 & 23 Vict. c. 21 passed as far back as 1859, it was not till November last, that is, after an interval of four years, that the Court of Exchequer, in consequence of the difficulty which arose as to settling the bill of exceptions in this case, had recourse to this 26th section, and made the rule of the 4th of November, 1863, in order to get rid of the embarrassment in which it found itself placed. It may be that, from a doubt of the propriety of extending the right of appeal to revenue causes, the legislature may purposely have stopped short of introducing an appeal clause into the Act of 1859, and may have contented itself with affording a remedy by bill of exceptions, as being of a more formal character, and less likely to be resorted to, except on

very substantial grounds, and as avoiding the inconvenience of making the Crown a party to the special case to be stated in the case of appeal.

This view of the case becomes materially confirmed when it is observed how much of the provisions of the Common Law Procedure Acts in relation to proceedings on error has been introduced by specific enactment into the statute in question. In the 9th, 10th, 18th and 19th sections we have the provisions of those Acts relating to error applied to revenue causes. It follows that either parliament did not consider the adoption of these provisions as within the competency of the Court of Exchequer within the 26th section, or did not think proper to leave legislation on such a matter to the Court instead of providing it by act of parliament. Why then should a different course have been pursued in the perfectly analogous case of proceeding by appeal? Again, in the 20th section, we have a provision for the right to a bill of exceptions. If the legislature had intended to give the proceeding by appeal as well, why should it have stopped short of saying so? Still more striking are the provisions of the 12th and 13th sections, by which, in cases of appeal from the assessments of the Commissioners of Inland Revenue to the Court of Exchequer under the Succession Duty Act (proceedings clearly on the revenue side of the Court), an appeal is given, in the very terms of the Common Law Procedure Act, to the Court of error in the Exchequer Chamber, and from this Court to the House of Lords. Can it be supposed that if the legislature had intended to extend the right to appeal further, it would have confined its specific application to this particular instance? According to the well known rule of construction, must not the express enactment in the particular case be taken to negative the intention to extend the provision generally? If, indeed, there were no provi-

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sions of the Common Law Procedure Acts which were applicable to assimilating the procedure of the two sides of the Court of Exchequer, except the provision as to appeal, I should feel greater difficulty as to the construction of the 26th section. But there are several most valuable provisions which would fall plainly within the procedure of the Court in my sense of the term. Among these may be enumerated the provisions as to evidence, as to discovery and inspection, and as to trial,—provisions which have had the effect of improving the administration of justice in the Courts of law in a very eminent degree. To the adoption of these and similar provisions of the Common Law Procedure Acts the power of the Court of Exchequer, in my opinion, alone extends. To push it further would be, I think, to make parliament say what it has not said, and do what it has not done—to legislate, in short, instead of expounding the statute, which alone is within our province.

I regret to be obliged to come to this conclusion ; partly because the proceeding by bill of exception appears to have been given up on the belief that this proceeding could be adopted ; still more because, if the view I have taken be correct, the opportunity will be lost of settling the law on the very important question of the construction of the Act of the 59 Geo. 3, c. 69, as to the equipment of ships for the service of belligerents. We should, however, be altogether departing from the principles on which, in the discharge of our judicial functions, it is our solemn duty to act, if we allowed ourselves to be influenced by considerations such as these. We must interpret the act of parliament, on which alone the present question depends, as we would do any other statute, and as though the discussion and decision of a great question of national importance were not depending on our judgment on this preliminary objection. I cannot, however, but observe, in conclusion, that in all

probability we shall neither prejudice the parties, nor delay the ultimate decision of this great question, by dismissing this appeal. Whatever might have been our decision on the main question had we proceeded to hear this appeal, this case would no doubt have been taken to the House of Lords. Doubtless such will be the case now; and if the highest appellate tribunal should hold the decision of this Court on the question of jurisdiction to be erroneous, the case will be heard there upon its merits, just as, no doubt, it would have been had we heard this appeal out, and decided the main question involved in it. It is satisfactory, therefore, to think that no injury or delay will be occasioned by dismissing this appeal in the present stage, even should we be wrong. I concur with those members of the Court who think that, according to the true construction of the 26th section, we have no jurisdiction to entertain this appeal, and that our only course is to dismiss it.

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Appeal dismissed (a).

(a) The Crown appealed to the House of Lords, and Lord *Westbury*, C., Lord *St. Leonards*, Lord *Chelmsford*, and Lord *Kingsdown* were of opinion that the Court of

Exchequer had no power to make the Rules; Lord *Cranworth* and Lord *Wensleydale* were of a different opinion.



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BAKER v. THE GUARDIANS OF THE BILLERICAY UNION.

No action can be maintained against the guardians of a union or parish for any debt, claim, or demand due from them unless such action is commenced within the half year in which the same shall have been incurred or become due, or within three months after the expiration of such half year, or unless the time has been extended by the Poor Law Board, under the 22 & 23 Vict. c. 49, s. 1.

DECLARATION for goods sold and delivered, work done, and materials provided, &c.

Plea (inter alia).—That the matter herein pleaded to was a debt, claim, or demand incurred by the defendants as the guardians of an Union, after the passing of the Act, &c. (22 & 23 Vict. c. 49), intituled “An Act to provide for the payment of debts incurred by Boards of Guardians in Unions and Parishes and Boards of Management in School districts;” and that the plaintiff did not commence any proceedings for the said debt within the half year in which the same was incurred or became due, or within three months after the expiration of such half year; nor has the Poor Law Board granted any extension of time for the payment of the said supposed debt, or any part thereof; nor was this action commenced within the time limited by the statute in such case made.—Issue thereon.

By order of Nisi Prius the cause was referred to an arbitrator, who stated a case for the opinion of this Court (so far as material) as follows:—

The plaintiff is a surgeon, and one of the medical officers of the Billericay Union. The defendants are the board of guardians of the same Union. The plaintiff’s appointment was with the consent of the Poor Law Board, and on the terms of remuneration fixed by Articles 177 and 183 of the General Consolidated Order of the Poor Law Board, dated the 24th day of July, 1847.

The action was brought to recover extra medical fees (beyond the yearly salary) accruing in the half year ending

the 29th of September, 1861. The date of the first item was the 29th of March, and the last the 1st of July.

The writ issued on the 9th of June, 1862.

The question for the opinion of the Court is, whether the above plea is or is not bad in substance.

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D. D. Keane, for the plaintiff.—By the 22 & 23 Vict. c. 49, s. 1 (*a*), any debt, claim, or demand due from the guardians of any union or parish “shall be paid within the half year in which the same shall have been incurred or become due, or within three months after the expiration of such half year, but not afterwards :” provided that the Poor Law Board may, if they see fit, extend the time for a period not exceeding twelve months after the date of such debt, claim, or demand. By section 4 (*b*), if proceedings have been

(*a*) Sect. 1.—“With respect to any debt, claim, or demand which may, after the passing of this Act, be lawfully incurred by or become due from the guardians of any union or parish, or the board of management of any school or asylum district, such debt, claim, or demand shall be paid within the half year in which the same shall have been incurred or become due, or within three months after the expiration of such half year, but not afterwards, the commencement of such half year to be reckoned from the time when the last half year’s account shall or ought to have been closed according to the order of the Poor Law Commissioners or Poor Law Board: Provided that the Poor Law Board, by their order, may, if they see fit, extend the time within which such payment shall be made for a period not exceeding twelve months after the date of such debt, claim, or demand.”

(*b*) Sect. 4.—“If any person claiming any debt or demand shall have commenced or shall hereafter commence proceedings in any Court of law or equity, or before any justice or other competent authority, within the time hereinbefore limited, or within the time to which the Poor Law Board may grant extension, and shall with due diligence prosecute such proceedings to judgment or other final settlement of the question, such judgment shall be satisfied by the guardians or managers against whom or against whose officer the same may be brought, notwithstanding that such judgment may be recovered or such final settlement arrived at after the expiration of the period hereinbefore provided, and all proceedings taken by mandamus or otherwise for the enforcing of such judgment without delay shall be deemed to be within the operation of this section.”

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commenced in any Court of law or equity within the time limited, or to which the Poor Law Board may grant extension, and have been prosecuted with due diligence to judgment, such judgment shall be satisfied by the guardians notwithstanding such judgment may have been recovered after the period prescribed. The statute does not in express terms prohibit the bringing an action, but merely says that the debt shall be paid within the time limited, but not afterwards. Therefore that provision is no answer to an action for the debt, though it may possibly afford ground for application to a Court of equity to restrain execution. [*Bramwell*, B.—The presumption is that the legislature has not enacted a law so absurd as to allow an action to be commenced in which the defendant may apply to the Court of Chancery to restrain execution.] The 1st section imposes on the defendants the duty to pay the debt, and the plea sets up a breach of duty as an answer to a breach of contract. If the debt were paid after the time limited by the 1st section, the auditors might disallow it; or it might be objected that due diligence was not used in prosecuting the proceedings to judgment, as required by the 4th section, but there is nothing in the Act which authorizes a plea of this kind. [*Pigott*, B.—Out of what fund is the plaintiff to be paid?] There is no rule of law which prohibits a retrospective rate: *Harrison v. Stickney* (a); and it seems that the real and personal property of the guardians is liable to the debts of judgment creditors: *The Attorney General v. Wilkinson* (b). Or it may be that the defendants, who in breach of their duty have omitted to pay at the right time, would have to pay with their own monies. Moreover the plea is bad in form; for at the time it was pleaded the period during which the Poor Law Board might have granted an extension had not expired with respect to all the items of claim.

(a) 2 H. L. 108.

(b) 28 L. J. Chan. 392.

C. Pollock appeared for the defendants, but was not called upon to argue.

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POLLOCK, C. B.—We are all of opinion that the defendants are entitled to judgment. The action is brought to recover a debt due from the guardians of a Poor Law Union to the plaintiff, one of the medical officers of the Union. The 22 & 23 Vict. c. 49, s. 1, says that such a debt shall be paid within the half year in which the same was incurred or became due, or within three months after the expiration of such half year, but not afterwards; and the question is, whether a plea setting up the fact that the action was not commenced until after that period expired is an answer to the action; or in other words, whether, when the legislature has said that a debt shall be paid within a limited time, but not afterwards, an action may be brought for it, and the defendant compelled to apply to a Court of equity to restrain the execution. I am clearly of opinion that when a statute says that a debt shall not be paid after a certain time, no action can be maintained for it. The principle applies to a large class of demands; but it is sufficient to say that where a man has contracted to do something which at the time of the contract was lawful, but which has subsequently become unlawful, as for instance, by the termination of peaceful relations between this country and foreign nations, no action can be brought against him on the contract. Here the statute says that the debt shall not be paid after the time prescribed, and the common sense is, that if it is not to be paid it cannot be sued for.

Any objection to the form of the plea is met in either of two ways; in the first place, by saying that the time limited has expired; and, secondly, if at the time of plea pleaded the period within which the Poor Law Board might have granted an extension had not expired, the answer is that

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the Poor Law Board has not extended the time. If they should afterwards do so, I think that an action might be maintained. This action was brought after the time prescribed by the statute had elapsed, and before any extension of it by the Poor Law Board, and therefore it is not maintainable.

BRAMWELL, B.—I am also of opinion that the defendants are entitled to judgment. I should have had no doubt but for the proviso at the end of the first section, because when a statute says that a debt shall not be paid the obvious meaning is that it shall not be sued for. My difficulty was whether, as the Poor Law Board has power to extend the time, the statute would be a bar until the period during which they might have granted an extension had expired. The probable solution of the difficulty is this—if any action be brought after the time has elapsed, and before the Poor Law Board has granted an extension of it, the action is barred; but a fresh action may be brought if the Board afterwards think fit to extend the time. In general, when a debt is once barred it is barred for ever; for a judgment in one action cannot properly be said to be a bar to another action unless it prevents the plaintiff from maintaining it. But to this rule there are exceptions. Where an attorney brings an action for work done by him as such, without having one month before delivered a signed bill, the action is barred, but not his claim; for if he afterwards complies with the requisites of the Attorneys' Act, he may maintain a fresh action. Again the Statute of Limitations deprives a creditor of his remedy, and in one sense of his action; but if there is afterwards an acknowledgment in writing, or part payment of the principal debt or interest, he may maintain another action. So, here, I think that if the Poor Law Board should afterwards grant an extension of the

time, though the plea is a bar to this action, the plaintiff might maintain another action.

CHANNELL, B.—I am also of opinion that our judgment ought to be for the defendants. The question whether the plaintiff is entitled to recover depends on the 22 & 23 Vict. c. 49, and in my opinion that statute is a bar to the action. Where the enacting words of a statute go beyond the preamble, if they are clear and unambiguous they cannot be restrained by it. That is a sound rule of construction; but it is quite consistent with it to refer to the preamble and ascertain what light it throws on the enacting clauses. Now the preamble of the 22 & 23 Vict. c. 49 says that it is expedient to define and limit the period during which debts thereafter incurred by guardians of unions for the relief of the poor may be paid. The first section limits three periods, two definite, the third, in a sense, indefinite; viz., within the half year in which the debt shall have been incurred or become due, within three months after the expiration of such half year, or within the time which the Poor Law Board is empowered to extend for payment; which may be considered as providing equitable relief. The plea negatives the fact that the action was brought within the two first periods, and it avers that the Poor Law Board have not granted any extension of the time for payment. Therefore that section alone would afford an answer to this action. But it is argued that, reading the 1st and 4th sections together, there is nothing to prohibit the bringing an action. In my judgment the 4th section does not create any difficulty. It provides that if an action be commenced within the time limited, or within the time to which the Poor Law Board may grant extension, the judgment shall be satisfied by the guardians notwithstanding it may be recovered after the expiration of the period, provided the pro-

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ceedings to final judgment have been prosecuted with due diligence. It is obvious that it would have been a hardship if it were otherwise. Here the plaintiff should have clothed himself with authority from the Poor Law Board. Although this action is barred, if he should obtain from the Board an extension of time I think that he may bring a fresh action; for it will not be substantially the same claim when the plaintiff is armed with a new authority.

PIGOTT, B.—I am of the same opinion. Under the old administration of the Poor Law, overseers let claims run in arrear and made retrospective rates. These were frequently disputed and litigation followed, the expense of which often fell upon the overseers. This statute has a double object, to protect the rates and define the duties of guardians. It requires the creditor to make his claim within the specified periods, and prohibits the guardians from paying after those periods. They have no power to extend the time, but that power is conferred on another body whose duty it is to controul them. The statute is in effect a statute of limitations, and if we did not so construe it as to support this plea we should defeat its object and embarrass guardians. A judgment being obtained, execution might issue against any one of them at the discretion of the plaintiff, so that in some instances ruinous consequence might overtake an individual discharging a public duty without any compensation. For these reasons I think that the plea is good, and that the defendants are entitled to judgment.

Judgment for the defendants.

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DECLARATION.—For that by indenture, dated the 17th of June, 1854, between W. Maud and A. Maud of the first, J. Knowles of the second part, the plaintiff of the third part, and the defendant of the fourth part, the defendant covenanted with the plaintiff that he the defendant would pay a moiety of a legacy of 400*l.* therein mentioned to the legal personal representative of W. Parker in case of his death under age, and also would save harmless and keep indemnified at all times thereafter the plaintiff against all liability consequent on the non-payment of the said moiety of the said legacy.—Averments: that the said W. Parker died under age, and that the plaintiff has performed all conditions precedent, &c., to entitle him to recover the said moiety of 400*l.*—Breach: that the defendant did not nor would pay the said moiety or save harmless or keep indemnified the plaintiff, after the making of the said indenture, against all liability consequent on the non-payment of the said moiety of the said legacy, and the plaintiff in consequence of such non-payment incurred liability for costs in defending himself against a suit in equity brought against him by the said personal representative, which liability was consequent on the non-payment of the said moiety within the meaning of the said covenant, and against which liability the defendant did not save

A testator gave, on the death of his granddaughter a legacy of 400*l.* to her child or children, to be paid at their respective ages of twenty-one years, and he charged the legacy on his residuary real and personal estate. The plaintiff, who was entitled under the will to a moiety of the real estate, effected a partition with the person entitled to the other moiety, and each of them covenanted with the other to pay a moiety of the legacy of 400*l.* The testator's granddaughter had only one child who died under the age of twenty-one years. In his lifetime the plaintiff

sold his part of the real estate to the defendant, who covenanted with the plaintiff to pay him a moiety of the legacy of 400*l.*, and also to save harmless and keep indemnified the plaintiff against all liability consequent on the non-payment of it. The personal representative of the legatee instituted a suit in Chancery to recover the legacy, when it was held that on the death of the legatee it ceased to be a charge on the testator's real estate. The plaintiff having brought an action against the defendant on his covenant to pay a moiety of the legacy:—*Held*, that the plaintiff was entitled to recover 200*l.*, and not merely nominal damages.

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harmless or keep indemnified the plaintiff, by reason whereof the plaintiff sustained damage to the amount thereof, to wit, to the amount of 35*l.*, from or against which damage the defendant has not saved harmless or indemnified the plaintiff.

Pleas.—First: as to the first breach of covenant mentioned in the declaration, payment into Court of 1*s.*, and that the same is sufficient to answer the claim of the plaintiff in the matter pleaded to.

Second.—As to the residue, that the legacy in the declaration mentioned was alleged or supposed to be payable under the will of one J. Jennings, deceased, to the said W. Parker, or to his legal representative in case of his death under the age of twenty-one years, at a certain time and upon certain conditions; that after the said W. Parker died under twenty-one, and before any breach by the defendant of any of the covenants mentioned, the plaintiff gave notice to the defendant that the legal representatives of W. Parker were not entitled to be paid or to receive the said moiety of the said legacy, and requested the defendant not to pay the same to them; that thereupon the defendant in pursuance of and in compliance with the said notice and request of the plaintiff, refused to pay and did not pay the said moiety to the said representatives, which is the non-payment of the moiety in the declaration mentioned; that upon and in consequence of such refusal and non-payment by the defendant, and not otherwise, the said suit in equity was brought against the plaintiff by the said legal representatives; that such proceedings were afterwards had in the suit that it was decided and decreed that the legal representatives of W. Parker were not entitled to be paid or to receive the said moiety of the said legacy, and that the defendant was not bound to pay the same, and that the liability of the plaintiff for the costs in the second breach mentioned arose and was incurred

solely and in consequence and by reason of such non-payment as aforesaid by the defendant, and in pursuance of and in compliance with the said notice and request of the plaintiff as aforesaid, and that the said costs would not otherwise have arisen or been incurred.

Issue on so much of the first plea as alleged that the sum paid into Court was sufficient to satisfy the plaintiff's claim in respect of the matter therein pleaded to.

Demurrer to second plea, and joinder therein.

By consent the following case was stated for the opinion of this Court:—

John Jennings by his will (dated the 7th of January, 1835), after a devise of real estate, gave an annuity of 32*l.* to his son John, and after his decease an annuity of 20*l.* to his granddaughter Mary Button. “And upon the death of my said granddaughter Mary Button, I give and bequeath to her children the legacy or sum of 400*l.*, to be shared and divided equally between and amongst them in case there shall be more than one, and if but one then to such only child, and to be paid to such child or children respectively at his, her, or their respective ages of twenty one years. And I order and direct that if any child or children of my said granddaughter shall happen to die before his, her, or their share or shares of the said sum of 400*l.* shall become payable by virtue of this my will, then the share or shares of him, her, or them so dying shall go and be paid to his, her, or their surviving brothers and sisters and the executors and administrators of any brother or sister who shall have lived to attain the age of twenty-one years, at such time as his, her, or their original share or shares shall become payable. And I also order and direct that all and every the share and shares hereinbefore directed to survive and accrue, shall from time to time survive and accrue, together with the original share and shares, until such original share and

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shares shall by virtue of this my will become payable; and that the share and shares of such of the children of my said granddaughter as, at the time of her death, shall be under the age of twenty-one years, shall bear interest at the rate of 5 $\frac{1}{2}$ per cent. per annum from her decease, and that such interest shall be paid and applied half yearly for and towards the maintenance, education, and benefit of such last mentioned child or children until their respective shares of the principal shall become payable."

The testator then devised his dwelling-house and certain lands and all the residue of his real and personal estate, " (but subject to and charged with the payment of all my debts and funeral and testamentary expenses, and also subject to and charged with the annuities and legacies hereinbefore given), in manner following, that is to say, as to one moiety or equal half part of the said real and personal estate, unto my daughter Jane Jennings, her heirs, executors, administrators and assigns, according to the nature and tenure thereof respectively; and as to the other moiety or equal half part thereof unto my daughter, Eliza Jennings, and her assigns, for and during the term of her natural life; and from and immediately after her decease unto my grandson, R. Hodgson, his heirs, executors, administrators and assigns, absolutely for ever."

The testator appointed the said Jane Jennings and R. Hodgson executrix and executor of his will. He died shortly after the date of his will. At the time of the date of the will and of his death, Mary Button was the wife of James Button, by whom she had two children who died in infancy. James Button died in 1837, and in 1847 his widow, the said Mary Button, married Thomas Parker, by whom she had one child, William Parker. Mary Parker died on the 15th September, 1851.

Elizabeth Jennings survived the testator a few days.

After her death the plaintiff and Jane Jennings effected a partition of the hereditaments so to them devised in moieties, and the hereditaments hereinafter stated to have been conveyed to the defendant were part of the hereditaments which, on such partition, were conveyed to the plaintiff in severalty.

In the deed by which the partition was effected Jane Jennings and the plaintiff covenanted with each other that each would pay and satisfy one moiety of the said legacy of 400*l.*, and would indemnify the other against the payment of such moiety.

In the lifetime of W. Parker, and after the partition was effected, the hereditaments hereinafter stated to have been conveyed to the defendant were by the plaintiff offered for sale by auction, subject to certain conditions of sale, one of which was, that the premises were intended to be sold "subject to a legacy of 400*l.* bequeathed by the will of John Jennings, payable to one W. Parker, then aged five years and upwards, on his attaining the age of twenty-one years, with interest in the meantime, for his maintenance, education, and benefit; or to the payment of the principal to the legal personal representative of the said W. Parker, in case of his death under age, and to the payment by the purchaser, his appointee, heirs or assigns, of one moiety of the said legacy of 400*l.* and interest accordingly." The defendant purchased subject to that condition.

The hereditaments which the defendant so purchased were conveyed to him by the said indenture of the 17th of June, 1854. The said W. Maud, A. Maud and J. Knowles were mortgagees, and as such joined as conveying parties.

The indenture recited the will so far as related to the annuities and the legacy, and their charge on the real estate, the testator's death and the death of Elizabeth Jennings, and the deed of partition, and the covenant con-

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tained therein for payment by the plaintiff of the moiety of the legacy of 400*l.*, and the various mortgage deeds; and lastly it contained a recital of the contract of purchase as being free from incumbrances except the moiety of the legacy of 400*l.*

The witnessing part of the indenture contained a conveyance by the plaintiff and the mortgagees to the defendant and his heirs of the said hereditaments, "subject to the payment by the said J. Wood, his heirs or assigns, of one moiety of the said legacy of 400*l.* to the said W. Parker on his attaining the age of twenty-one years, with interest at 5*l.* per cent. per annum in the meantime, for his maintenance, education, and benefit, or to the payment of the principal of the said moiety to the legal personal representatives of the said W. Parker, in case of his death under age; and the other moiety of which said legacy was, on the partition of the said hereditaments, charged with the whole thereof covenanted to be paid by the said J. Jennings, his heirs, &c., as aforesaid, and also further subject as hereinafter mentioned."

The covenant declared on immediately followed the habendum in the following words:—"And which said moiety of legacy and interest so to be paid by the said J. Wood, his heirs or assigns, as aforesaid, he the said J. Wood, for himself, his heirs, executors and administrators, doth hereby covenant with the said R. Hodgson, his heirs, executors, and administrators, to pay accordingly, and also to save harmless and keep indemnified at all times hereafter the said R. Hodgson, his heirs, executors, and administrators against all liability consequent on the non-payment of the said moiety of legacy and the interest thereof, or any part thereof respectively."

W. Parker died on the 28th of April, 1860, after the execution of the deed of conveyance, under the age of twenty-one.

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T. Parker, who obtained letters of administration of the personal estate as his personal representative, claimed to be entitled to the legacy of 400*l.*, and applied to the plaintiff for payment of 200*l.*, being one moiety thereof. The plaintiff having been advised by counsel that the legacy, in the events which had happened, was no longer a charge upon the hereditaments, objected to the claim, and contended that he was entitled to have the amount paid to him by the present defendant, and so informed the defendant.

After the service of the bill, and before appearance, the now plaintiff served the now defendant with a notice not to pay the legacy of 400*l.*, or any part thereof, to T. Parker, the plaintiff in the Chancery suit.

The Court of Chancery decided, amongst other things, that on the death of W. Parker under age the legacy of 400*l.* ceased to be a charge on the real estate so devised in moieties, and that his said personal representative was not entitled to have the legacy raised and paid out of the same; and the Court dismissed the bill with costs (a).

The now plaintiff received from T. Parker all the costs incurred by the now plaintiff in defending the suit, except certain extra costs which were not allowed on taxation, and which formed the subject of the claim in the second breach of the declaration.

The now defendant has not paid the moiety of the legacy to T. Parker, or to anyone, but seeks to retain it for his own benefit.

The Court is to be at liberty to draw such conclusions of fact as a jury might and ought to draw.

The question for the opinion of the Court upon the first issue is, whether, under the circumstances stated, the plaintiff is entitled to more than nominal damages for the breach of covenant committed by the defendant in not paying the

(a) See *Parker v. Hodgson*, 1 Drew. & S. 568.

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moiety of the said legacy to the personal representative of W. Parker.


If the Court shall be of opinion that the plaintiff is not entitled to more than nominal damages for that breach, the plaintiff is, as to that breach, to enter a nolle prosequi; but if the Court shall be of opinion that the plaintiff is entitled to more than nominal damages for that breach, he is to be at liberty, when the demurrer is disposed of, to sign judgment as by consent for 200*l.* upon that breach, with costs of suit to be taxed, and the judgment as to the other breach is to be entered according to the event of the demurrer. The amount of damages for which the plaintiff is to have judgment under the second breach is, if necessary, to be referred to and assessed by the Master.

Cleasby, for the plaintiff (*a*).—First, the plaintiff is entitled to recover 200*l.*, and he would hold it as a trustee for the person who may ultimately establish his right to it. In order to ascertain the measure of damage, regard must be had to the construction of the deed and the rights and obligations of the parties. Now there is an absolute and unqualified covenant by the defendant to pay the plaintiff a moiety of the legacy of 400*l.* Where one person covenants with another to pay him a sum of money, the legal claim to damage for breach of that covenant is the sum covenanted to be paid. Although the legacy has ceased to be a charge on the real estate, by reason of the death of the legatee under the age of twenty-one: *Parker v. Hodgson* (*b*), the covenant remains obligatory on the defendant. Even in equity he would be liable, for he purchased the estate subject to the payment of a moiety of the legacy.

As to the second plea, it merely sets up a parol request

(*a*) Before Pollock, C. B., Pigott, B.
 Bramwell, B., Channell, B., and (b) 1 Drew. & S. 568.

not to pay the money, which is no answer to this covenant. An obligation created by an instrument under seal can only be discharged by an instrument of equal validity: *Davey v. Prendergrass* (a). The plea being bad, the plaintiff is entitled to judgment on the demurrer, which also raises substantially the same question as the special case; but he is willing to forego his claim to the extra costs of defending the suit in equity.

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Mellish (*Horace Lloyd* with him), for defendant.—The question is, what damage has the plaintiff sustained by reason of the defendant's refusal to perform his covenant. If the defendant had paid the moiety of the legacy, the plaintiff would have received no benefit, for he could not have recovered it from the representative of the legatee. If A. covenants with B. to pay a sum of money to C., B. is a trustee for C. and on a breach of that covenant may recover the full amount, but if A. covenants with B. that he will pay him a sum of money for the purpose of indemnifying him against a liability which subsequent events render nugatory, the damage in respect of that breach of covenant is nominal only. Here it is evident upon the face of the deed that the object of the covenant was merely to indemnify the plaintiff against a sum which it was supposed he would be called upon to pay when the legatee attained the age of twenty-one years.

Cleasby, in reply.—This is not a mere covenant to indemnify, but a covenant *to pay* and also save harmless and keep indemnified. In *Warwick v. Richardson* (b), a testator devised his real and personal estate to two trustees to sell and invest 10,000*l.* for the benefit of certain persons. One of the trustees received the money and used it in his private

(a) 5 B. & Ald. 187.

(b) 10 M. & W. 284.

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trade, and gave to the other trustee a bond of indemnity. The legatees filed a bill in Chancery against the trustees, and obtained a decree that they were liable to pay the 10,000*l.*; and in an action on the bond it was held that the obligor was liable for that amount and interest, and not merely the costs incurred in the Chancery suit. In *Lethbridge v. Mytton* (a), the defendant by his marriage settlement conveyed estates upon certain trusts, and covenanted with the trustees to pay off incumbrances on the estates, to the amount of 19,000*l.*, within a year; and having failed to do so, it was held that the trustees were entitled to recover 19,000*l.* in an action on the covenant, although no special damage was laid or proved. In *Carr v. Roberts* (b), a covenant to "save, protect, defend, keep harmless and indemnify" from the payment of debts, was held to amount not only to a covenant to indemnify, but also to pay the debts.

Cur. adv. vult.

Subsequently, on the same day, the judgment of the Court was delivered by

POLLOCK, C. B.— We are all of opinion that our judgment ought to be for the plaintiff.

The covenant sued upon is an absolute covenant by the defendant to pay to W. Parker, or his personal representatives, the sum of 200*l.* If no reason had appeared for the covenant, or if it had been stated that the object of the covenant was to make to W. Parker a gift of 200*l.*, no doubt the damage would have been 200*l.*; but it is said that, because there is in this case what may possibly be a bad reason, the plaintiff is not entitled to recover the full amount.

(a) 2 B. & Adol. 772.

(b) 5 B. & Adol. 78.

It has been agreed at the Bar that the question is substantially the same on the demurrer as on the special case ; and therefore the plaintiff is entitled to judgment on the demurrer ; but it is understood that the plaintiff abandons all claim in respect of the extra costs in equity.

Judgment for the plaintiff accordingly.

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THIS was an action to recover 21*l.* 10*s.* 6*d.* The plaintiff declared upon the common money counts.

Pleas.—First, as to 5*l.*, parcel of the money claimed: Never indebted. Second, as to 5*l.* 5*s.* 6*d.*, other parcel thereof: Set-off. Third, to the residue of the declaration: Payment into Court of 11*l.* 5*s.*

The plaintiff joined issue on the first and second pleas, and accepted the sum paid into Court in full satisfaction and discharge of the causes of action in respect of which it was paid in.

The cause came on for trial before *Pollock*, C. B., and a jury at the Derbyshire Spring Assizes, 1863, when, it appearing that the question involved was substantially matter of account, his Lordship directed it to be referred (a). An arbitrator was accordingly appointed by the parties, and a

Where a cause is referred and a verdict taken subject to a reference, costs of the cause to abide the event, the arbitrator to have power over the verdict, the plaintiff's right to costs depends on whether the sum awarded would have entitled him to costs if the jury had found a verdict for that sum.

To a declaration on the money counts the defendant

pleaded, as to part, never indebted; as to other part, set-off; and to the residue, payment of 14*l.* 5*s.* into Court. At the trial a verdict was entered for the plaintiff subject to a reference, power being reserved to the arbitrator to direct for whom and what amount the verdict should be finally entered, costs of the cause to abide the event of the award. The arbitrator by his award vacated the verdict for the plaintiff, and directed that the sum which he thereby found to be due to the defendant on the set-off should be deducted from the sum which he found to be due to the plaintiff on the general issue, and that the balance (2*l.* 16*s.* 1*d.*) should be paid by the defendant to the plaintiff.—*Held*, discharging a rule obtained by the plaintiff to recover his costs of the action, that the 11th section of the County Court Act (13 & 14 Vict. c. 61) operated to deprive the plaintiff of his costs.

Held also, that the circumstance that the order of reference had by mistake been drawn up as a reference of all matters in difference was immaterial, it not appearing that any other matters than those which formed the subject of the action were brought before the arbitrator.

(a) See *Robson v. Lees*, 6 H. & N. 258.

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verdict was entered for the plaintiff for the amount claimed, subject (as appeared by the associate's indorsement) to a reference on the usual terms.

By the terms in which the order of reference was drawn up it was ordered, with the consent of the parties, that a verdict should be entered for the plaintiff, subject to the award of an arbitrator (whom the order specified) who was to be at liberty to order and direct for whom and for what sum the verdict should be finally entered; and that it should be referred to the arbitrator to settle all matters in difference between the parties, and to order and determine what he should think fit to be done by either party respecting the matters in dispute, who thereby agreed to be bound and concluded by such determination. And it was further ordered that the arbitrator should possess the same powers as a judge at nisi prius as to certifying; and that *the costs of the cause should abide the event of the award*; and the costs of the reference and award should be in the discretion of the arbitrator.

The arbitrator by his award, after reciting the order of reference, and averring that he had duly considered the evidence produced before him, awarded, ordered and adjudged, that the verdict entered for the plaintiff should be vacated; and as to the first issue, that the defendant was indebted to the plaintiff in the sum of 5*l.* 5*s.* 6*d.* over and above the sum of 11*l.* 5*s.* paid into Court; and as to the second issue that the plaintiff was indebted to the defendant in respect of the matters in the second plea alleged in the sum of 2*l.* 9*s.* 4½*d.*; and he further awarded, ordered, and directed, that the said sum of 2*l.* 9*s.* 4½*d.* should be allowed out of and deducted from the said sum of 5*l.* 5*s.* 6*d.*, and that the defendant should pay to the plaintiff the sum of 2*l.* 16*s.* 1½*d.* the balance. And he further awarded and directed that the plaintiff should pay to the defendant his

costs of the reference and award, and bear his own costs of the same.

The arbitrator did not certify for costs. The award did not dispose of any matters in difference between the parties besides the questions in the action, nor did it appear from the affidavits that any evidence of other matters in difference had been adduced before the arbitrator.

The *postea* was made up in conformity with the award, but it concluded as follows: "And they (the jurors) assess the damages of the plaintiff on occasion of the premises to 2*l.* 16*s.* 1½*d.* over and above his costs and charges by him about his suit in this behalf expended [and for those costs and charges to 40*s.*]" (*a*).

The order of reference had been made a rule of Court.

The plaintiff and defendant dwelt in the same parish a mile apart, and the cause of action had arisen wholly within the jurisdiction of the County Court within which they both dwelt at the time when the action was brought.

The Master having adjourned the taxation, *Martin, B.*, at Chambers, stayed proceedings, directing that an application should be made to the Court.

F. T. Streeten, on a former day in this Term, obtained a rule calling on the defendant to shew cause why the plaintiff should not recover his costs, and why the Master should not tax the same; against which

J. F. Stephen shewed cause (Nov. 12).—The plaintiff is not entitled to the costs of the cause. The 13 & 14 Vict. c. 61, s. 11, enacts:—"That if in any action commenced after the passing of this Act in any of her Majesty's superior

(*a*) Upon the hearing of a summons before *Pollock, C. B.*, his Lordship amended the *postea* by striking out the words in brackets. The Court had previously been applied to, and had intimated that the application should be made to the Judge who presided at the trial.

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Courts of record, in covenant, debt, detinue, or assumpsit, not being an action for breach of promise of marriage, the plaintiff shall *recover* a sum not exceeding 20*l.* the plaintiff shall have judgment to recover such sum only, and no costs, except in the cases hereinafter provided." The plaintiff has recovered less than 20*l.*, and it is not contended that this case is within the exception. The only question therefore is, as to the meaning of the clause in the submission, "costs of the cause to abide the *event* of the award." In *Griffiths v. Thomas* (a), Coleridge J. said: "It seems to me the true meaning of the submission is what its words import, that costs, i. e. the payment of costs, shall follow the event, i. e. the *legal* event of the award." The *legal* event here is, in the words of this section, judgment for the plaintiff for the sum recovered and no costs. The verdict is the verdict of the jury for whom the arbitrator is substituted: *Cooper v. Pegg* (b). The cases of *Wigens v. Cook* (c), *Kelcey v. Stupples* (d), and *Jones v. Jones* (e), are distinguishable. In *Wigens v. Cook* the record was withdrawn, *Jones v. Jones* was referred before trial, and *Kelcey v. Stupples* before issue. Moreover, in *Jones v. Jones*, Williams, J., in the course of the argument, expressly distinguished *Cooper v. Pegg*, upon the ground that the arbitrator was in that case substituted for the jury. In the latter case, as here, a verdict was taken subject to a reference, and the 2nd section of Lord Denman's Act (3 & 4 Vict. c. 24) was held to be applicable, though in terms limited to a recovery by the verdict of a jury. The language of the 11th section of the County Court Act (13 & 14 Vict. c. 61) contains no such limitation, so that this is, in fact, an *à fortiori* case.

F. T. Streeten, in support of the rule.—By the order of

(a) 4 D. & L. 109.

(b) 16 C. B. 264.

(c) 6 C. B., N. S. 784.

(d) 1 H. & C. 576.

(e) 7 C. B., N. S. 832.

reference, the costs of the cause were to abide the event of the award. The event is in the plaintiff's favour. [*Bramwell*, B.—The award is informal. The arbitrator ought to have stated in whose favour each issue was found, and to have directed for what amount the verdict should be entered.] Substantially, all the issues are found for the plaintiff, though the finding is incorrect in point of form. It is not, however, contended that if the plaintiff had signed judgment he could have obtained his costs as part of his judgment. In this respect the statute might operate as a bar. But in the present case the arbitrator has vacated the pro formâ verdict, and has directed that the sum of 2*l.* 16*s.* 1½*d.* should be paid by the defendant to the plaintiff. The order of reference having been made a rule of Court, the plaintiff, it is submitted, is entitled to tax his costs upon the award. In *Cooper v. Pegg* (a) this point was left undecided. In that case the application was to amend the postea, and *Jervis*, C. J., in giving judgment, expressly guarded himself from intimating any opinion whether the plaintiff could tax his costs on the award. The cases of *Wigens v. Cook* (b), *Jones v. Jones* (c), and *Frean v. Sargent* (d), establish the plaintiff's right to costs, since no valid distinction can be drawn from the circumstance that in this case there was a nominal verdict. [*Pollock*, C. B.—The argument on the other side is that, where there is a verdict, the statute deprives the plaintiff of costs, but that it does not apply where there is no verdict.] A verdict cannot be the true criterion, since the operation of the 11th section of the County Court Act (13 & 14 Vict. c. 61) is not limited to a recovery by *verdict* (e). In *Jones v. Jones* (c) the true ground of decision was, not that there was no verdict, but that the costs

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(a) 16 C. B. 264.

(d) 2 H. & C. 293.

(b) 6 C. B., N. S. 784.

(e) See *Parr v. Lillicrap*, 1

(c) 7 C. B., N. S. 832.

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were by the agreement of the parties to abide the event of the award. The principle of that decision is as applicable where a verdict is taken subject to a reference, as where a cause is referred before trial. Then it is said that this was a compulsory reference; but the answer is, that the order of reference was drawn up "by consent," and that without consent, a Judge at Nisi Prius has no power to refer (*a*). Again, by the terms of the order of reference, all matters in difference were referred. [*Pollock*, C. B.—The order being in a printed form, it was by mere inadvertence that those words were not struck out. Moreover, it does not appear that any other matters than those which were in difference in the cause were discussed before, or disposed of by the arbitrator.] As to the arbitrator's power to certify, that might have been inserted, as is pointed out by *Byles*, J., in *Wigens v. Cook* (*b*), for other purposes than costs.

Cur. adv. vult.

POLLOCK, C. B., now said.—We are all of opinion that this rule should be discharged. The case falls within the express words of the 11th section of the County Courts Act (13 & 14 Vict. c. 61), and the facts are not such as to except it from the operation of that statute. At the trial, upon the opening of the plaintiff's case, I pointed out that the question in dispute was substantially one of account, and directed that it should be referred, and it was thereupon referred to an arbitrator appointed by the parties. The arbitrator by his award has disposed of all questions in the cause which were in dispute. It is true, indeed, that upon the issue raised by the plea of set-off he has merely found a certain fact, instead of giving to that finding its legal effect; but in substance he has decided that issue.

(*a*) See *Robson v. Lees*, 6 H. & N. 258.

(*b*) 6 C. B., N. S. 795.

It is also true that by the terms in which the order of reference was drawn up all matters in difference were referred. But that circumstance arose from a mere inadvertence on the part of the officer in not striking out those words from the common printed form of order. No other matters besides those which were disposed of in this action were shewn to be in dispute. If there were any error in the *postea* that is now amended. The case differs from any of those cited on behalf of the plaintiff, since here the reference was for the purpose of modifying the verdict. The plaintiff recovers by the verdict of the jury modified by an award; and, the sum recovered being under 20*l.*, he is not entitled to costs. Full effect should, in my opinion, be given to those statutes which operate to deter litigation from being commenced hastily because a bare legal right of action exists.

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BRAMWELL, B., said.—I think this rule in form incorrect, and that it must be discharged. The plaintiff has recovered by verdict, modified by an award, a sum under 20*l.* If this had been the verdict actually pronounced by the jury, it is conceded the plaintiff would not be entitled to costs, and if there were an assessment of costs upon the record it would be error. It is sought however to obtain these costs by rule. The view of the Master accords with my own, that it would be contrary to the universal practice that anyone who has obtained a verdict, and is entitled to judgment, should obtain the costs of the action in any other mode than as part of his judgment.

I prefer however to deal with the case upon another ground. The parties by consent have referred the amount of the verdict to arbitration, and have agreed that the costs shall abide the event. In *Robertson v. Sterne* (a), a cause

(a) 13 C. B., N. S. 248.

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was referred compulsorily, costs to abide the event. The question was upon the construction of the London Small Debts Act (15 & 16 Vict. c. lxxvii., s. 120), which enacts that if in an action of contract within the jurisdiction the plaintiff "shall recover a sum not exceeding 20*l*." &c., "the plaintiff shall have judgment to recover such sum only and no costs" except in certain cases. The judgment of the Court of Common Pleas was delivered by my brother *Willes*, and the following passage in the judgment combines sound reasoning and good sense:—"This section in terms deprives the plaintiff of his costs in the event which has happened, unless the order in its terms can and does dispense with the statute. It appears to us, however, that the statute and the order are not necessarily in conflict, for that the section adds to the ordinary events of a cause a third and modified one, viz. for the plaintiff, but without costs, unless he obtain an order; and that the order of reference, which is the same in all cases, and speaks the language of the *Court* when it says that the costs of the cause 'shall abide the event,' refers to the event quoad costs equally as to the mere event in favour of the plaintiff or defendant." The passage which follows appears to suggest a distinction between a reference by compulsion and by consent. "It cannot justly be imputed to the Judges who framed it that they intended to exclude from the operation of the statute *all* cases in which there was a compulsory reference. The decisions referred to as to references by consent before trial, *Wigens v. Cook* (a) and *Jones v. Jones* (b), are obviously inapplicable, because to the result of such a reference the law attaches no special consequences as to costs; whereas, in the event which has here taken place, there is a statute which says expressly that the plaintiff shall have no costs." In this reasoning I fully concur so far as is necessary to

(a) 6 C. B., N. S. 784.

(b) 7 C. B., N. S. 832.

support that decision, but I dissent from the distinction apparently drawn between a reference by compulsion and by consent. For in either case the result which binds the parties is the same, viz., that costs abide the event, though it is arrived at by different means; in the one case by agreement of the parties, in the other by order of the Court. In this respect I adhere to my opinion as reported in *Frean v. Sargent* (a). There the plaintiff was held to be entitled to his costs because there was no statute to deprive him of them; here he is not entitled, because there is such a statute.

With regard to the authorities no decision is directly in point. The cases cited in the argument were nearly all decided upon the construction of Lord Denman's Act, (3 & 4 Vict. c. 24), which only applies where there has been a verdict. *Jones v. Jones* (b) however did not turn upon Lord Denman's Act. There the plaintiff had obtained judgment by default subject to a reference, and if the action had been commenced in the superior Courts the statute would, as I think, have applied and deprived the plaintiff of costs, inasmuch as he would have been entitled to sign judgment for a sum under 20*l.*, but not to a certificate. If, indeed, he could not have signed judgment, the statute would not apply. But assuming he could, the decision is perfectly correct, since the action was not originally brought in a superior Court, but removed by certiorari from an inferior Court. It is true this circumstance is not adverted to in the judgment, as reported. But if the meaning of the rule be not, that the case was taken out of the operation of the County Courts Act, I think it was informal.

In the result I am of opinion that the rule which should govern these cases is, that wherever a plaintiff obtains his damages in the action by means of a judgment, and

(a) 2 H. & C. 293.

(b) 7 C. B., N. S. 832.

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would by the County Courts Act be deprived of his costs if there were no reference, he is equally deprived of them where there is a reference fixing the amount of the damages if he do not obtain the necessary certificate.

CHANNELL, B., said.—I entirely agree, although in the course of the argument I entertained some doubt. I also think with my brother *Bramwell* that this rule might be disposed of upon the matter of form. If the plaintiff be entitled to costs, it must be by virtue of the order of reference, made a rule of Court; and, if the costs can be taxed at all, they must be taxed upon the rule. I am of opinion, however, that, since by the terms of the reference the arbitrator had power to direct a verdict to be entered, and since he has, in effect, directed for what amount the verdict should stand, the plaintiff must be deemed to have recovered that amount in the action. If so, he is deprived of his costs by the express words of the 11th section of the County Courts Act. The authorities are not at variance with this view. In the cases cited, where the plaintiff succeeded in obtaining his costs, the reference was before verdict, which is not the case here. The observations in *Frean v. Sargent (a)*, which, at first sight, might seem to interfere with our present decision, have been explained.

PIGOTT, B., said.—I am of the same opinion. I do not think that the circumstance that the order of reference, in terms, includes all matters in difference between the parties, creates any distinction. With regard to the authorities, I concur in the observations which have been made by my brother *Bramwell*, and am of opinion that

(a) 2 H. & C. 293.

they do not interfere with the principle which should govern the present case. I think it immaterial whether the plaintiff recovers here by the verdict or by the award of the arbitrator.

Rule discharged.

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WAKLEY v. FROGGATT.

Nov. 10.

TRESPASS for breaking and entering the plaintiff's land and closes, called &c., and cutting down destroying and carrying away divers trees &c. then being and growing thereon &c.

Plea.—For defence on equitable grounds, that heretofore, and before and at the time of the making of the agreement and bargain and sale hereinafter mentioned, one Thomas Wakley, since deceased, was possessed and seized in his demesne as of fee of and in the said lands and closes respectively in the declaration mentioned, and that thereupon afterwards and before the committing of the alleged trespasses &c. the said Thomas Wakley, being so possessed and seized as aforesaid, by and under a certain agreement then made, bargained and sold to the defendant certain trees, underwood, and ornamental timber then growing in and upon the said land and closes &c., including amongst others the said trees &c. in the said declaration respectively mentioned, upon the terms that, in the event of the said land and closes being sold by the said Thomas Wakley within a certain time then in that behalf named (as he the said Thomas Wakley

To a count in trespass for cutting down and carrying away timber growing on the plaintiff's land the defendant pleaded, for defence on equitable grounds, that the former owner, whose devisee the plaintiff was, had by agreement bargained and sold certain timber growing thereon to the defendant upon the terms that in a certain event the defendant might from time to time enter, cut down and carry it away at an agreed price; that, after the happening of

the event and in the testator's lifetime, the defendant entered, cut down and carried away, and paid for part of the timber sold, and that his entering, cutting down and carrying away other part thereof, in pursuance of the said agreement, after the testator's death, and within a reasonable time, constituted the alleged trespass.—*Held*, that the plea was bad upon the ground that a Court of equity would not grant an unconditional injunction to restrain the action, and that a common law judgment for the defendant would not do final justice between the parties.

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was then desirous to do), the said trees &c., so bargained and sold as aforesaid, should be cut down and carried away and paid for by the defendant within twelve months from the date of the said agreement, and that in the event of the said Thomas Wakley failing to sell the said lands and closes as aforesaid, then that the defendant might from time to time, as to him the defendant should seem fit and convenient for that purpose, enter into and upon the said land and closes &c. for the purpose of cutting down and carrying away, and should and might then and there cut down and carry away such of the said trees &c. so bargained and sold as aforesaid as he the defendant might think fit, and that he the defendant should pay to the said Thomas Wakley, his executors &c., a certain price or sum at and after a certain rate then in that behalf agreed upon between them, for and in respect of the said trees, underwood, and ornamental timber so from time to time cut down and carried away as aforesaid. And the defendant avers that the said Thomas Wakley failed to sell the said land and closes, and the same were not sold by the said Thomas Wakley within the said time in that behalf named as aforesaid, and that afterwards and after the making of the said agreement and bargain and sale hereinbefore mentioned and in the lifetime of the said Thomas Wakley, since deceased, and before the said times when &c., the defendant did duly and under and in pursuance of the said agreement enter into and upon the said land and closes &c. for the purpose of cutting down and carrying away, and did then and there cut down and carry away divers of the said trees &c., so bargained and sold as aforesaid, other than the said trees &c. in the said declaration mentioned, and then duly paid for the same under and according to the said terms of the said agreement. And the defendant further says that the said Thomas Wakley, being so possessed and seized in the said lands and closes as

aforesaid, duly made and published his last will and testament in writing according to the form of the statute in such case made and provided, and thereby gave and devised the said lands and closes &c. to the plaintiff, and that afterwards and before the committing of the said trespasses the said Thomas Wakley, being so possessed and seized as aforesaid, departed this life, without having in any way revoked or altered the said devise to the plaintiff. And the defendant further says that afterwards and after the death of the said Thomas Wakley, and within a reasonable time in that behalf he the defendant, duly and under and by virtue of the said agreement and bargain and sale, entered into and upon the said land and closes respectively in the said declaration mentioned for the purpose of cutting down and carrying away and did then and there duly and under and according to the said terms of the said agreement, and within a reasonable time in that behalf, cut down and carry away the said trees &c. in the said declaration mentioned, the same respectively forming part and parcel of the said trees &c. so bargained and sold by the said Thomas Wakley in his lifetime as aforesaid, which were the alleged trespasses in the said declaration mentioned.

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Hayes, in support of the demurrer.—The plea discloses no defence either at law or in equity. The contract made with the testator is personal and does not bind his devisee. Further, the contract is by parol and contravenes the Statute of Frauds for two reasons; first, it relates to an interest in land; secondly, it is not to be performed within a year. The defendant will contend, upon the equitable doctrine of part performance, that the defendant would be entitled to enforce this contract in equity. But the ground on which a Court of equity interposes in such cases is to prevent fraud, and the party who seeks to avail himself of the interposition of the Court must have done some act of part per-

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formance which would prejudice his position if the contract were not carried out. Here the defendant would suffer no prejudice. He has merely paid for certain trees which during the testator's lifetime he was allowed to cut and carry away. It is not material however to consider whether the contract could be enforced in equity, since that circumstance would be no answer to the present action. At common law the price of the trees could not be recovered. The testator's executors have no interest in the timber; and between the defendant and the plaintiff there is no contract. A decree would be necessary to work out the equities; the executors should be before the Court, and the decree would only be enforced upon terms. The principle is well settled that an equitable plea will not be entertained in a Court of law if a perpetual unconditional injunction would not be granted in a Court of equity: *Mines Royal Societies v. Magnay* (a); *Wodehouse v. Farebrother* (b); *Clerk v. Laurie* (c). The common law judgment, that "the defendant go without day" would not do complete and final justice between the parties.

Turner, in support of the plea.—The plea discloses a good defence in equity. The plaintiff taking the land by devise necessarily takes it charged with the equities which bound it in the testator's hands. A legal conveyance of the timber by the testator would have carried with it an irrevocable licence to enter and cut down: *Wood v. Leadbitter* (d), and the judgment of *Vaughan*, C. J., in *Thomas v. Sorrell* (e), therein cited. Here, although there was no legal conveyance, there was a contract which, whether in writing or verbal, a Court of equity would enforce, upon the ground that the defendant had, in part performance of

(a) 10 Exch. 489.

(b) 5 E. & B. 277.

(c) 1 H. & N. 452.


(d) 13 M. & W. 844. 845.

(e) *Vaughan*, 351.

his contract, placed himself in such a situation that it would be a fraud on him if the contract were not fully performed. In Story's Equity Jurisprudence, sect. 761, this doctrine of Courts of equity is thus illustrated:—"If upon a parol agreement a man is admitted into possession he is made a trespasser, and is liable to answer as a trespasser if there be no agreement valid in law or equity. Now, for the purpose of defending himself against a charge as a trespasser, and a suit to account for the profits in such a case, the evidence of a parol agreement would seem to be admissible for his protection; and if admissible for such a purpose there seems no reason why it should not be admissible throughout." At sect. 788, the same learned author says:—"It may also be stated that in general where the specific execution of a contract respecting land will be decreed between the parties, it will be decreed between all persons claiming under them in priority of estate, or of representation, or of title, unless other controlling equities are interposed." [*Channell, B.*—Can it be contended that a Court of equity would here grant an injunction without the imposition of any terms upon the defendant? *Bramwell, B.*—How could the contract be enforced against the defendant if the plea were held to be an answer to the action?] The plaintiff could enforce the contract by suit in equity. The defendant is in no default in the contemplation of a Court of equity. He might assume that he was at liberty to act under his contract until the plaintiff gave him notice not to do so.—He also referred to Sugden's Vendors and Purchasers (13th ed.), p. 128, par. 10.

Hayes, Serjt., replied.

POLLOCK, C. B.—I am of opinion that this plea cannot be supported. The object of the enactment which

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gave effect to equitable pleas in a Court of law was to enable a defendant, instead of filing a bill in equity to restrain the plaintiff from proceeding at law, at once to plead the matter which would have entitled him to equitable relief as an answer to the action. But one of the earliest restrictions imposed by the Courts of law was, that unless the effect of the plea was to furnish a complete answer to the action and terminate the litigation, it should not be entertained. And in applying equitable doctrines in a new case I think we should be cautious not to enlarge their operation so as to increase the equitable jurisdiction of a Court of law. If, indeed, an authority were produced, the principle of which was clearly applicable, a mere difference in the facts of the case would not influence our judgment. But the case of *Wood v. Leadbitter* (a) (the only authority cited by the defendants) certainly points to no principle which can authorize this Court to prevent one who has succeeded by devise to real estate from stopping his timber from being cut down under a claim based upon a contract with his testator, which is not in writing. No authority has been adduced for the proposition that, although there is no mutuality, and neither grant nor written contract between the parties, the heir or devisee is in such a case bound. In the absence of authority, I am not disposed to think that a Court of equity would enforce such a bargain against an heir, merely because some of the trees have been cut down and taken away during his ancestor's lifetime. But whether that be so or not, the plea is clearly bad upon the ground that a judgment for the defendant would not finally settle the whole matter in dispute between the parties.

BRAMWELL, B.—When these pleas were introduced it

(a) 13 M. & W. 838.

was thought desirable to distinguish them as *equitable* pleas. This case confirms the opinion which I then entertained, that this distinction is a mistake. When once a plea is admitted as a defence in a Court of law it becomes a legal defence. Thus the plea of solvit post diem to an action upon a common money bond is undoubtedly a legal defence, although it had its origin in the equitable relief against a penalty administered by the Court of Chancery before the statute 4 Anne, c. 16. Courts of law have no machinery for administering equities. Here, if we pronounced the common law judgment, "that the plaintiff take nothing by his writ and that the defendant go thereof without day," it would obviously work injustice. The plaintiff could not sue for the price of the trees, neither could the personal representatives of the testator. The defect of the plea would be more apparent if the words "upon equitable grounds" were not introduced.

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CHANNELL, B.—The facts stated in this plea would not entitle the defendant to an absolute and unconditional injunction in a Court of equity, and if not, the plea affords no answer. The defendant could only obtain equitable relief by making certain offers which he has not made. I agree that some confusion has arisen from the use of the terms "equitable plea" and "defence on equitable grounds," but I understand that the effect of the act of parliament is to render available as legal defences certain matters which were not previously available in a Court of law.

PIGOTT, B.—I agree, upon the short ground that judgment for the defendant would not do complete and final justice between the parties.

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Nov. 13.

Feb. 8.

EASTON and Another v. PRATT and Another.

A testator devised his freehold dwelling-house and premises to his three daughters and the survivor for life, "with full power to them or her to grant leases thereof, or of any part thereof, for a term or terms not exceeding twenty-one years, at a rack rent, and without taking any premium or premiums for the same; or building or repairing leases for the term of sixty-one years."

The surviving daughter granted a lease for forty years, which contained a covenant by the lessee well and sufficiently to repair, maintain, amend and keep the demised premises, in, by, and with all

manner of needful and necessary reparations and amendments whatsoever, and at the determination of the term to yield them up so being in all things well and sufficiently repaired, amended, and kept together. The lessee also covenanted that the lessor should be at liberty to enter and to view the state of the premises and that the lessee would, within three months after notice, sufficiently repair, amend, and make good all defects and want of reparation. There was a right of re-entry upon breach of the covenants.—*Held*, in the Exchequer Chamber (reversing the judgment of the Court of Exchequer) that this was a good "repairing lease" within the meaning of the power.

EJECTMENT to recover possession of a piece of ground formerly a tan-yard, and a dwelling-house and other buildings, situate in the Grange Road, Bermondsey, in the county of Surrey.

At the trial, before *Bramwell*, B., at the Surrey Summer Assizes, 1863, the following facts appeared:—Charles Easton, being seised in fee of the premises in question, by his will, dated the 4th of September, 1828, devised (inter alia) as follows:—"I also give, devise, and bequeath all that my freehold house, sheds, yards and premises situate in the Grange Road aforesaid, and at which I now reside, unto my three daughters, Sarah Easton, Abigail Easton, and Mary Easton, to hold to them and the survivors and survivor of them during the term of their natural lives, with full power to them or her to grant leases thereof, or of any part thereof, for a term or terms not exceeding twenty-one years, at a rack rent and without taking any premium or premiums for the same, or building or repairing leases for the term of sixty-one years." There was a devise in fee to the testator's sons on the death of the surviving daughter. The testator died in the year 1832.

Mary Easton, the surviving daughter, by indenture made the 29th of September, 1859, after reciting the power contained in the will of Charles Easton, in consideration of

the rents, covenants and agreements thereafter reserved, and in execution of the recited power, demised and let to Henry Hunt the said premises for and during and unto the full end and term of forty years, from the 29th day of September, 1859, at the rent of 110*l.* payable quarterly. The lease contained (amongst others) the following covenant:—"And the said H. Hunt, for himself, his heirs, executors, &c., doth covenant with the said Mary Easton, her executors, &c., that he the said H. Hunt, his executors, &c., shall and will, at his and their own costs and charges, when and as often as need shall require, during the term hereby granted, well and sufficiently repair, uphold, support, paint, maintain, amend, and keep the hereby demised premises, and all buildings hereafter erected by him thereon, and all pavements, walls, fences, posts, iron and other rails, privies, sewers, drains, and other appurtenances belonging or which shall belong to the same premises, in, by, and with all manner of needful and necessary reparations, cleansings, scourings and amendments whatsoever: And the said demised premises with the appurtenances so being in all things well and sufficiently repaired, upheld, supported, amended, and kept, together with all doors, wainscots, locks, keys, bars, &c., and all such things as now are, or at any time hereafter during the said term hereby granted, shall be anyways fixed or fastened to or set up in or upon, or which shall belong to the said demised premises, shall and will at the expiration or sooner determination of the term hereby granted, peaceably and quietly surrender and yield up unto the said Mary Easton, or her assigns, &c. And further, that he the said H. Hunt, his executors, &c., shall and will, as often as need shall require during the term hereby granted, bear, pay, or allow a reasonable share and proportion of the cost or charge of the making, supporting, repair-

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ing, amending, and cleansing, as well all party-walls, party-gutters, common sewers, public sewers, and drains belonging, or which at any time during the term hereby granted shall belong to the said demised premises," &c. There was also a covenant that it should be lawful for Mary Easton, or her assigns, &c., to enter upon the demised premises to view the state and condition thereof, and to give notice in writing for the amendment of all defects and wants of reparation; and that H. Hunt, his executors, &c., would within three months after such notice sufficiently repair, amend and make good all such defects and want of reparation. There was no absolute covenant to put in repair, or to expend any definite sum in repairing, nor was the lease expressed to be granted in consideration of any such outlay.

Mary Easton died in 1862, and the present action was brought by the persons entitled in remainder, on the ground that the lease was not a valid execution of the power.

It was agreed that a verdict should be entered for the plaintiffs, and that it should be referred to an arbitrator to find in what state the premises were when the lease was granted, and that upon his finding the defendants should have leave to move to enter a nonsuit. The arbitrator found that at the time when the lease was granted one of the buildings had been recently rebuilt and was in good repair, but that the dwelling-house and other buildings, comprised in the lease, though habitable and in tenantable repair, were so old and decayed as to be likely at any time to become ruinous and unfit for the purposes for which they had theretofore been used, from the mere operation of time and ordinary wear and tear.

In the present Term, a rule nisi was obtained to enter a nonsuit, on the ground that the lease was a due execution of the power; against which

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Lush and Murphy shewed cause.—This lease is not within either branch of the power; for it is not a lease for a term not exceeding twenty-one years at a rack rent, neither is it a building or repairing lease for the term of sixty-one years. The intention of the testator was to empower the tenants for life to grant leases for twenty-one years, at a rack rent; but in consequence of the state of the premises, they might be unable to let them for that term, and therefore they are empowered to grant building or repairing leases for sixty-one years. The word “or” should be read “and,” so that the lease must be a building and repairing lease. But if it be not so read, the expression “repairing lease” is not satisfied by a lease containing the ordinary covenant to keep the premises in repair. The liability under a repairing lease is altogether different from the common liability of a lessee to repair under a usual covenant in a lease at rack rent: Sugden on Powers, sect. 31, p. 830, 8th ed. The covenant in this lease would not compel the lessee to repair dilapidations caused by operation of time and ordinary wear and tear. A lease containing a covenant “effectually to repair” is not a good execution of a power to demise for the purpose of “rebuilding and repairing:” *Doe d. Dymoke v. Withers* (a). Moreover, the power to demise for the specific term of sixty-one years is not satisfied by a lease for forty years. *Isherwood v. Oldknow* (b) may be cited as an authority to the contrary; but that decision proceeded on the ground that the apparent object of the power was to limit the extent of the benefit which the tenant for life should take in granting leases, so that they should not prejudice the interests of the persons in remainder.

Raymond, in support of the rule.—This lease is a valid

(a) 2 B. & Adol. 896.

(b) 3 M. & Sel. 382.

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execution of the power. The question is, what was the intention of the testator. The first objects of his bounty were his three daughters, and he meant to secure to them during their respective lives as ample an enjoyment of the estate as possible. Therefore he empowers them, first, to grant leases for a term not exceeding twenty-one years, at a rack rent, and without taking any premium for the same. But the state of the premises might be such that they would not let for that term at a rack rent; and therefore a power is conferred to grant building or repairing leases. This is a repairing lease within the terms of the power, for under the covenant the lessee is bound to repair and keep in repair. It may be that the testator was not aware of the nature of the obligation under the ordinary covenant to repair; but he evidently contemplated two states of things, viz., premises in repair, and premises not in repair. If in repair they were to be let on lease at a rack rent; if not in repair, they were to be let on lease containing a covenant to put them in such a state of repair as would command a rack rent. It is sought to read the will as if the testator had used different language; but there is no reason for reading the word "or" as "and." The judgment in *Doe d. Dymoke v. Withers* (a) proceeded on the ground that the power required a lease containing a covenant both to "re-build and repair." As to the objection that the lease is for forty years only, *Isherwood v. Oldknow* (b) is a conclusive authority that a lease is not invalid because it is granted for a shorter term than is authorized by the power.

POLLOCK, C. B.—We are all of opinion that the rule ought to be discharged. If we had merely to consider the question as to the length of the term, I think that, accord-

(a) 2 B. & Adol. 896.

(b) 3 M. & Sel. 382.

ing to the authority cited, we could not have held this lease invalid because it was not granted for the term of sixty-one years. But a clear ground for our decision arises from this—the power is to grant a lease for a term not exceeding twenty-one years, at a rack rent, or a building or repairing lease for the term of sixty-one years. I will assume that the latter might be for forty or fifty years, or any term less than sixty-one, provided it is of the requisite description; but this lease is not good as a lease at a rack rent, because it is for a term exceeding twenty-one years, and it is not good as a lease for more than twenty-one years because it is not a building or repairing lease.

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CHANNELL, B.—I am also of opinion that the rule ought to be discharged. This is not a lease for a term not exceeding twenty-one years, at a rack rent; and therefore cannot, in my judgment, be a good execution of the power unless it is either a building or repairing lease. I give no opinion upon the point whether a lease for a term exceeding twenty-one years must be for the definite period of sixty-one years. Neither do I give any opinion upon the point whether the word “or” should be read “and.” That is unnecessary in the view I take, because it is not suggested that this is a building lease, and the sole question is whether it is a repairing lease. Looking at the terms of the covenant to repair, I am of opinion that it cannot be considered as a “repairing lease” within the meaning of the power.

PICOTT, B.—I am of the same opinion. The language of the will is “or building or repairing lease;” and I think that the testator, in using the word “repairing,” meant to signify something different from a lease containing the ordinary covenant to keep in repair which is found in leases at

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a rack rent. It seems to me that this lease is not within the language of the will, and therefore an invalid execution of the power.

BRAMWELL, B.—I also think that the rule ought to be discharged. I do not desire to express an opinion upon a matter not necessarily in question, but I may observe that at the trial I thought that the point made was, that as this was a lease for a term exceeding twenty-one years it should have been for sixty-one years. But the leasing power is in derogation of the remainderman's title, and therefore in all reason may be construed thus:—"You may lease *to the extent* of sixty-one years." It is a matter of speculation, whether it is not as much for the interest of the remainderman that the lease should be for a term less than sixty-one years as for that definite term. The case of *Isherwood v. Oldknow* (a) seems to me an authority in point.

With respect to the other question I am of opinion that this is not a good "repairing lease," for it merely contains the common covenant to keep in repair. I should say that, independently of authority, the expression "repairing lease" requires something more than the common covenant, which does not oblige the lessee to amend defects caused by time in the substantial fabric of the building. The authority of Lord *St. Leonards*, in his Treatise which has been cited (b), is conclusive on that point. But then it is said, assuming this is not upon the face of it a good repairing lease, if extrinsic circumstances be looked at it becomes so, because the premises cannot be kept in repair unless they are previously repaired. But the answer is, first, that the fact is not proved; and secondly, that under a repairing lease the

(a) 3 M. & Sel. 882.

(b) Sugden on Powers, sect. 31, p. 83, 8th ed.

lessee is bound not only to repair at the outset, but to keep in repair during the whole term without regard to the age or previous condition of the premises. For these reasons I think that this is not a repairing lease within the meaning of the power, and consequently the rule must be discharged.

Rule discharged.

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The defendants having appealed against the above decision of the Court of Exchequer, the case was argued in the Exchequer Chamber in the following Hilary Vacation (a) (Feb. 3) by

Mellish (*Wills* with him), for the defendants.—The only question is, whether this is a “repairing lease” within the meaning of the power. The Court of Exchequer decided that it was not, because it merely contained the ordinary covenant to keep the premises in repair. *Isherwood v. Oldknow* (b) is an express authority that the lease is not invalid because it is granted for a shorter term than is authorized by the power. The arbitrator has found that some of the buildings, “though habitable and in tenantable repair, were so old and decayed as to be likely at any time to become ruinous and unfit for the purposes for which they had heretofore been used from the mere operation of time and ordinary wear and tear;” and the judgment of Lord *Tenterden* in *Doe d. Dymock v. Withers* (c), and the observations of Lord *St. Leonards* in *Sugden on Powers* (sect. 31, p. 830, 8th ed.,) were relied on as shewing that the power required something more than the ordinary covenant to repair. But assuming that the power does not require that the lease should be a build-

(a) Before *Cockburn*, C. J., and *Mellor*, J.

Erle, C. J., *Williams*, J., *Crompton*, J., *Willes*, J., *Blackburn*, J.,

(b) 3 M. & Sel. 382.

(c) 2 B. & Adol. 896. 901.

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ing lease, and that a lease may be granted for the purpose of getting the premises repaired, the question is whether this is not a repairing lease within the meaning of the power. No express definition of a repairing lease can be found in the text books. [*Cockburn*, C. J.—In common parlance it means a lease by which the lessee is bound to lay out money in repairing the premises.] Here the lessee covenants, as often as need shall require, well and sufficiently to “repair, uphold, support, paint, maintain, amend, and keep the demised premises,” and at the expiration of the term to deliver them up so repaired; and further, that the lessor may enter the premises to view the state and condition thereof, and give notice to the lessee to repair all defects within three months, and there is a power of re-entry upon default. Under such a covenant the lessee is bound to put the premises in repair, and is not justified in keeping them in bad repair because he found them in that condition: *Payne v. Haine* (a).

Murphy (*Lush* with him), for the plaintiffs.—It is important to consider what was the extent of benefit which the testator intended to confer on the tenant for life, and what burthen he intended to impose on the remainderman. He empowers the tenant for life to grant leases for a term not exceeding twenty-one years, at a rack rent; but if he burthens the remainderman with a lease for sixty-one years it must be a building *and* repairing lease. By reading the word “or” as “and,” effect will be given to the intention of the testator as apparent on the face of the will. Looking at the character of the premises, the testator might have contemplated that the land would let on building leases. But assuming that the tenant for life is empowered to grant a building *or* repairing lease, this is not a repairing lease

(a) 16 M. & W. 541.

within the meaning of the power, for it merely contains the ordinary covenant to repair: Sugden on Powers, sect. 31, p. 830, 8th ed. Under such a covenant the lessee is not bound to restore old buildings, but merely to keep the premises as nearly as possible in the same condition as when they were demised: *Gutteridge v. Munyard* (a). [Williams, J.—In Chance on Powers, vol. 2, p. 345, par. [2393], it is said:—"There is not much in the books with reference to powers to grant building or repairing leases." Blackburn, J.—Neither in Sugden or Chance on Powers is it stated what a repairing lease is, but those learned authors seem to consider it as well understood.] According to the defendants' construction, if, by the mere operation of time and ordinary wear and tear, the premises were not habitable when the remainderman came into possession, he would have no remedy under this covenant. [Crompton, J.—If this covenant is insufficient, it lies on the plaintiffs to shew what the covenant should have been.] A covenant binding the lessee to put the premises in such a state of repair as would compensate the remainderman for the postponement of the reversion coming into possession.

Mellish, in reply.—The lease recites the power, and professes to be made in pursuance of it. There is therefore no doubt as to the intention of the parties; and if the words of the covenant will admit of such a construction as to render this lease a "repairing lease" within the meaning of the power, the Court will so construe it. Now, part of the premises being in such a dilapidated condition that it might at any time be necessary to rebuild them, the lessee covenants to put them in repair, keep them in repair, and at the expiration of the term deliver them up in repair. Under that covenant the lessee would be bound to rebuild them if

(a) 1 Moo. & R. 334.

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he allowed them to fall down. Therefore the remainderman is not without compensation as suggested.

Cur. adv. vult.

Subsequently, on the same day,

ERLE, C. J., said.—The only question raised is, whether this lease is authorized by the power contained in the will of the testator; that is, whether it is a “repairing lease” within the meaning of the clause in the will which empowers the tenants for life to grant “building or repairing leases for the term of sixty-one years.” It does not appear that any case has decided what is the meaning of the term “repairing lease,” but it is admitted that this lease is valid if it is a repairing lease within the meaning of the power. Now, it is clear that this lease was intended to be within the power, because it recites both the will and the power; and it purports to be made pursuant to and in execution of the power. The lease contains a covenant by the lessee that he shall and will, “when and as often as need shall require during the term, well and sufficiently repair, uphold, support, paint, maintain, amend and keep the thereby demised premises, and all buildings thereafter erected by him thereon, and all pavements, walls, &c., in, by, and with all manner of needful and necessary reparations, cleansings, scourings and amendments whatsoever. And the said demised premises, with the appurtenances, so being in all things well and sufficiently repaired, upheld, supported, amended, and kept together, &c., shall and will at the expiration or other sooner determination of the term thereby granted peaceably and quietly surrender and yield up.” The lease also contains a covenant by the lessee that it shall be lawful for the lessor or her assigns to enter into the demised premises to view the state and condition thereof, and to give notice of all

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defects and want of reparation; and that the lessee shall and will within three months after such notice well and sufficiently repair, amend, and make good all such defects and want of reparation whatsoever. The lease also contains a power of re-entry on non-performance of the covenants. Looking at the circumstances, and the finding of the arbitrator that the greater part of the premises were, at the time when the lease was granted, in a very dilapidated state, I think that this is a good "repairing lease" within the meaning of the power. I do not find that the term "repairing lease" has a meaning as a term of art; nor do I find that the Court of Chancery has defined what is a "repairing lease." There is therefore no authority which compels us to say that this is not a repairing lease, and I think that nothing could be added to the words of this covenant which would render it the more a "repairing lease." The lessee covenants well and sufficiently to repair, uphold, support, maintain, amend, and keep, not only the demised premises, but all buildings thereafter erected, and to deliver them up well and sufficiently repaired, upheld, supported, amended, and kept together. That seems to me to fall within the requirements of the testator. I am at a loss to know what stronger words could be used, for to satisfy that covenant it would not be sufficient merely to prevent the premises from falling down. *Payne v. Haine* (a) shews that under a contract to *keep* the premises in repair, a tenant is bound to *put* them in repair. The learned Judges in the Court below said that this was not a "repairing lease" in compliance with the power, but they did not say what was required to make it one. I have come to the conclusion that this is a valid "repairing lease" in execution of the power. I have, however, to add on behalf of the Lord Chief Justice, who has left the Court, that he is not satisfied that it is not

(a) 16 M. & W. 541.

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a "repairing lease," but he neither concurs in nor dissents from this judgment.

The other Judges concurred.

Judgment reversed.

Nov. 25.

FLOWER and Others v. ALLAN.

Where a British subject having a warehouse in London, resides out of the jurisdiction of the superior Courts, efforts to serve him with a writ of summons, at his warehouse, when he is in fact abroad, are not such "reasonable efforts to effect personal service," within the meaning of the 17th section of the Common Law Procedure Act, 1852, as to justify an order, under that section, that the plaintiff be at liberty to proceed as if personal service had been effected.

The exception of Scotland and

Ireland in the 18th section of that Act does not, by implication, authorize proceedings against a person resident in those countries under the 2nd or 17th sections.

IN this case the plaintiffs had issued against the defendant a writ of summons in the form prescribed by the 2nd section of the Common Law Procedure Act, 1852, where the defendant is residing or supposed to reside within the jurisdiction of the Court.

On application to *Martin*, B., at Chambers, under the 17th section of that Act, he ordered that three days after the service of the copy of that order at defendant's residence the plaintiffs be at liberty to proceed in this action as if personal service of the writ of summons had been effected. The order was obtained upon affidavits of the plaintiffs' attorney and his clerk, which stated that the action was brought to recover 3215*l.* the balance claimed to be due to the plaintiffs, merchants carrying on business in London and Australia, upon an account current. That the defendant carries on his business in London, at No. 3, Thames Street, and also in Glasgow, and resides principally in Glasgow, but had no residence, place of business or place of abode within the jurisdiction of the Court other than in Thames Street; and that unless the plaintiffs' attorney should happen by chance to be informed when and where he might be found to be served with the writ upon the occasions of his being

in London, he should be unable to effect personal service. On the 10th of October, the plaintiffs' attorney wrote to the defendant, and informed him that the writ had been issued, and requested a reference to his solicitor who would accept service; and in reply, the defendant referred to a Glasgow firm, to whom the writ was sent, but they returned it, saying they had no instructions to appear for the defendant. On the 13th of October, the clerk of the plaintiffs' attorney called at the warehouse of the defendant, for the purpose of serving the writ, when he was told by a clerk that the defendant was not in, that he seldom came there, but that the clerk could forward anything to him by post. On the 14th of October, the attorney's clerk called again at the defendant's warehouse, and left a copy of the writ with a clerk, who stated that he would forward it to the defendant. On the 19th of October, the attorney's clerk called again, and the clerk said the copy writ had been forwarded to the defendant, who had acknowledged the receipt of it, but had sent no instructions. Upon a subsequent application, on the 20th of October, the manager made a similar statement, on being told that unless an appearance was entered an application would be made for leave to proceed.

The plaintiffs having proceeded, in pursuance of the order of *Martin, B.*, a summons was taken out at Chambers to set aside the order and all subsequent proceedings, on the ground that the defendant resided in Scotland and out of the jurisdiction of the English Court. The affidavits of the defendant, his manager, and clerk, in support of the application, stated that the defendant was a native of Scotland and had always been resident there, and was now resident in Glasgow; and that the plaintiffs' claim was not in respect of any transactions with the warehouse in Upper Thames Street. This summons was heard before *Pigott, B.*, who refused to make an order.

Watkin Williams, in the present Term, obtained a rule

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nisi to rescind the order of *Martin*, B. This rule was obtained on an additional affidavit of the defendant, that he was born in Glasgow, and was resident there, and had been so during the whole course of his life, and never in England: that his principal business then was and always had been carried on in Glasgow, where his foundry also was situate, and that the business carried on by him in London was only a subordinate branch of his principal business: that at the time the action was commenced he was not in England, and had not been there at any time since.

Hayes, Serjt., and *Thrupp* now shewed cause.—The order of *Martin*, B., was correctly made under the 17th section of the Common Law Procedure Act, 1852. [*Bramwell*, B.—The defendant resides out of the jurisdiction of the Court, and therefore that section does not apply.] The plaintiffs could not proceed against him under the 18th section, because that only applies to the case of a British subject residing out of the jurisdiction of the superior Courts, in any place except Scotland or Ireland. The 2nd section requires all personal actions to be commenced by writ of summons in the form there prescribed, “where the defendant is residing *or supposed to reside* within the jurisdiction of the Court. In *Hesketh v. Fleming* (a), where *Coleridge*, J., set aside an order under the 17th section, the defendant was a British subject residing in France, and therefore the proper course was to proceed against him under the 18th section. In *Naef v. Mutter* (b) an application to set aside an order under the 17th section was founded upon an affidavit of the defendant’s agent, that the defendant, at the time of the commencement of the action and long prior thereto, was and still remained resident in Edinburgh, and had no residence except in Scotland; and did not and never did reside at the London house, which was only a

(a) 24 L. J., Q. B. 255.

(b) 12 C. B., N. S. 816.

branch office for the receipt and dispatch of goods; but the Court refused to set aside the order, on the ground that they were not satisfied that the defendant was not in England at the time of the issuing of the writ, and perfectly cognizant of the proceedings against him. [*Bramwell*, B., referred to the judgment in *Mitcheson v. Oliver* (a).] The term "residence," in the Common Law Procedure Act, 1852, is used in the sense of "place of business;" and therefore it is enough that the defendant carries on business in England. The 6th section requires a plaintiff suing in person to indorse the writ with his place of residence, but in *Ablett v. Basham* (b) it was held that an attorney suing in person might state as his residence his place of business, although he never slept there. So, under the Assessed Taxes Act, 43 Geo. 3, c. 161, the words "reside or be" do not necessarily mean "dwell or sleep:" *The Attorney General v. M'Lean* (c). Again, under the Bills of Sale Act (17 & 18 Vict. c. 36, s. 1), which requires an affidavit of the residence of every attesting witness, it is sufficient if an attorney's clerk is described as of the office or place of business of his employers, although he sleeps elsewhere: *Attenborough v. Thompson* (d).

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Lush (with whom was *Watkin Williams*), in support of the rule.—It appears by the affidavit of the defendant that he has resided during the whole course of his life in Scotland, that he was not in England when this action was commenced, nor has he been there at any time since. It is clear, therefore, that the order is invalid, for the 17th section only applies where personal service cannot be effected upon a defendant within the jurisdiction of the

(a) 5 E. & B. 419.

(c) 1 H. & C. 750.

(b) 5 E. & B. 1019.

(d) 2 H. & N. 559.

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Court. If the writ had been served upon the defendant in Scotland the service would have been void; then how can a substituted service be better than actual service? Under the old law, a plaintiff could not obtain a *distringas* to compel an appearance unless the defendant was within the jurisdiction; and he could not obtain a *distringas* for the purpose of outlawry unless the defendant was abroad. The proceedings under the 17th section are substituted for the *distringas* to compel an appearance, and the proceedings under the 18th section are substituted for the *distringas* for the purpose of outlawry. But the latter section has excepted Scotland and Ireland, so that defendants who reside there must be sued in their own country. How can it be said that reasonable efforts have been made to effect personal service within the meaning of the 17th section, when the only efforts were made at a place where the defendant never came, and when he was in fact abroad? It is not sought to set aside the writ, which is valid and might be served within the jurisdiction. *Hesketh v. Fleming* (a) is an authority that the defendant is entitled to have the *order* set aside. In *Naef v. Mutter* (b) the defendant made no affidavit.

POLLOCK, C. B.—We are all of opinion that the rule ought to be absolute. It is unnecessary to decide what is the meaning of the word “residence,” or what would be the effect where a person residing abroad is a member of a firm in this country and sometimes visits his place of business here; because, when all the facts are viewed, although in the opinion of those who made the affidavits efforts were made to effect personal service, they were not such reasonable efforts as the statute requires, for at the time they were made the defendant was abroad.

(a) 24 L. J., Q. B. 255.

(b) 12 C. B., N. S. 816.

BRAMWELL, B.—I am of the same opinion, and have always acted upon it at Chambers. I think it was never intended that what has been attempted in this case should be done. I may conveniently refer to the provisions of the statute in inverted order. The 19th section provides for the case of an action against a person not being a British subject, but residing out of the jurisdiction. There, according to the spirit of the Act, notice of the writ may be served in Scotland or Ireland, or wherever the defendant may be out of the jurisdiction. Section 18 provides for the case of a defendant being a British subject and residing out of the jurisdiction in any place except Scotland or Ireland. Under that section the proceedings are the same as under the 19th section, except that under the latter section notice of the writ, and not the writ itself, must be served on the defendant. But for the exception in section 18, can anyone doubt that it would have applied to persons being British subjects, and residing in Scotland or Ireland, in which case the procedure given by sections 2 and 17 would clearly not have been applicable? Or suppose the 18th section had not been in the Act, is it not clear that proceedings could not have been taken under the 2nd and 17th sections against a defendant residing in Scotland or Ireland?

But it is argued that, because such a case is taken out of the 18th section, it is by implication put within the 2nd and 17th. It is manifest to me that it is not. I think the enactment perfectly coherent. What is the meaning of the words in the second section, “all personal actions, &c., where the defendant is residing or supposed to reside within the jurisdiction”? That is not happily expressed; but I think it means “all personal actions, &c., where it is intended that the writ shall be served within the jurisdiction”; and then provision is made by section 17 for cases in which personal service cannot be effected. Two arguments are to my mind

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conclusive on this point. One is, that substituted service supposes the possibility of actual service, and in this case there could have been none. The other argument is, that, supposing the real facts had been known, the efforts to serve the writ would clearly not have been *reasonable efforts* to effect personal service, for if the clerk had presented the writ to Aldgate pump (a), he might as well say that he had made reasonable efforts to effect personal service, as by going to a place where he knew that he never could see the defendant. Then, can a man be in a better position in consequence of such ignorance as enables him *bonâ fide* to make a statement to a Judge which induces him to grant an *ex parte* order? If he could not have made a proper affidavit, had he known the actual facts, he cannot be better off in consequence of his ignorance. Those two considerations seem to me decisive. While, therefore, I rest the case upon the ground on which I first put it, I am quite content to decide it upon the other ground, viz., that reasonable efforts have not been made to effect personal service, because "reasonable efforts" do not mean simply "reasonable" in the mind of the man who makes them according to his belief of the facts, but "reasonable" according to the actual facts.

Then, as to the authorities. The case of *Hesketh v. Fleming* is really in point. As to the case of *Naef v. Mutter*, all that the Court there decided was, that upon the evidence before them they were not satisfied that the defendant was not within the jurisdiction of the Court at the time the writ issued, and perfectly cognizant of the proceedings against him.

CHANNELL, B.—I am also of opinion that the rule should be absolute. *Hesketh v. Fleming* is so far applicable as shewing that the defendant is entitled to have the order,

(a) See 1 H. Black. 609.

but not the writ, set aside. In *Naef v. Mutter* the Court decided entirely on the ground that the affidavits did not satisfy them that the defendant was not within the jurisdiction. I found my judgment on this, that the affidavits do not shew that which is necessary to support the order, viz., that *reasonable efforts* have been made to effect personal service in the sense in which the expression must be understood in the 17th section. It appears to me that, if the person who proposed to serve the writ had gone once only to the defendant's warehouse, and received the answer which he got on the first occasion, that would have afforded no ground for contending that he had made reasonable efforts to effect personal service; and it does not appear that, on any subsequent occasion, he got any answer which would lead him to suppose that service could at any time be effected at the warehouse. I agree that substitution for personal service must be of such a nature that, if the service had been in fact effected, it would have been good. I therefore come to the conclusion that such reasonable efforts have not been made to serve the writ as will satisfy the 17th section; and unless that is made out to the satisfaction of the Court or a Judge there is no power or authority to make the order.

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PIGOTT, B.—I am of the same opinion. I agree with the rest of the Court in thinking that reasonable efforts have not been made to effect personal service, because upon these affidavits I am not satisfied that the defendant was within the jurisdiction at the time they were made. If it were necessary to put a construction upon the word "residence" in the 2nd section, I should be disposed to agree with *Erle, J.*, in the case of *Naef v. Mutter*, that it was evidently intended to be used in the largest sense.

Rule absolute.

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HALLETT v. DYNE.

Ex parte ROLLS and Another.

A plaintiff having obtained judgment, registered it in order to operate as a charge on land, under the 1 & 2 Vict. c. 110, ss. 13, 19. The plaintiff afterwards took the defendant in execution under a ca. sa., and he was discharged from custody under the Insolvent Act. He afterwards acquired leasehold property which he mortgaged, and the mortgagee contracted to sell it, but was unable to complete the sale in consequence of the registered judgment.—*Held*, that this Court had no power, on the application of the mortgagee, to order the plaintiff to attend before the senior

THIS was a rule calling on the plaintiff to shew cause why he should not attend before the senior Master of the Court of Common Pleas, and consent to an entry on the register there that the defendant in an action of *Hallett v. Dyne* was taken in execution by the plaintiff on the judgment recovered by him and there registered, on payment of the costs of such attendance.

It appeared by the affidavits in support of the rule, that on the 12th of November, 1853, the plaintiff signed judgment for 629*l.* 14*s.*, debt, and 5*l.* 13*s.* costs, and on the same day registered his judgment in the Court of Common Pleas, for the purpose of charging the lands, tenements and hereditaments of the defendant, pursuant to the 1 & 2 Vict. c. 110, ss. 13, 19. On the 13th January, 1854, the defendant was arrested under a ca. sa. at the suit of the plaintiff, issued upon the said judgment. On the 14th June, 1854, the defendant obtained an order, under the Insolvent Act, for his discharge from custody as to the plaintiff's debt at the end of fifteen months from the date of the vesting order, and he was accordingly discharged on the 4th of May, 1855. On the 4th of November, 1858, the plaintiff caused his judgment to be again registered. On the 14th of December, 1861, certain leasehold property was demised to the defendant for several terms of 1000 years; and on the same day the defendant mortgaged the property to one Daniel Rolls,

Master of the Court of Common Pleas, and consent to an entry on the register that the defendant was taken in execution by the plaintiff on the judgment.

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deceased, for the residue of the term, and the present applicants, who were his administrators, had contracted for the sale of the property under the powers of the mortgage deed; but the intended purchasers refused to complete in consequence of the registered judgment. Application had been made to the plaintiff, who was an attorney, to attend before the Master and to consent, upon payment to him of the costs of the action and of his attendance, to an entry being made in the senior Master's book, either that the said charge upon the defendant's said leasehold property had been satisfied, or that after the entry of the judgment the plaintiff took the person of the defendant in execution upon the judgment; but the plaintiff had refused.

The affidavits in answer to the application stated, that the plaintiff's debt was money lent to the defendant upon the deposit of title deeds purporting to relate to freehold property which the defendant agreed to mortgage to the plaintiff; and on his subsequent refusal to execute the deed, the plaintiff brought his action, and in November, 1853, he found the defendant and his attorney had absconded, and that the deeds deposited were duplicate deeds of property previously mortgaged. The plaintiff had issued a *fi. fa.* and recovered 49*l.*, but 580*l.* was still due, for which the plaintiff had no security except his judgment.

Prentice shewed cause.—The Court has no power to make the order; and if they had, they would not under the circumstances exercise it. The plaintiff by taking the defendant in execution has lost the benefit of the registration (1 & 2 Vict. c. 110, s. 16), but that is no reason why a third party should apply to this Court to compel the plaintiff to make an entry of the fact on the register of the Court of Common Pleas. It is doubtful whether this Court has any jurisdiction over the officer of the Court of Common Pleas. [*Channell*, B.—The senior Master

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of the Court of Common Pleas is the only officer authorized to register judgments, and therefore for that purpose he acts as the officer of all the Courts.] In *Wells v. Gibbs* (a), Lord Langdale, M. R., considered that he had no jurisdiction to order the senior Master of the Court of Common Pleas to vacate a memorandum, entered under the 1 & 2 Vict. c. 110, of an order to pay money to the credit of a cause. If the plaintiff has lost the benefit of the registration, there is no necessity for this application. But, assuming that the defendant would be entitled to make such an application, what right has a person who is a stranger to the judgment? *Lewis v. Dyson* (b) will be relied upon by the other side, but there the application was made by the assignee of the judgment debtor, who had become insolvent. [*Bramwell*, B.—Suppose this Court had ordered satisfaction to be entered on the roll, would the defendant be entitled to call upon the Master of the Court of Common Pleas to enter that fact on the register?] This Court has no power to order him to do so.

D. D. Keane, in support of the rule.—The Court is not asked to order an entry of satisfaction to be made, but simply an entry of the fact that after the registration of the judgment the plaintiff took the defendant in execution. In *Lewis v. Dyson* (b), *Erle*, J., directed a similar entry to be made on the register. [*Bramwell*, B.—If the arrest of the defendant under the ca. sa. operated as a satisfaction of the judgment, why not enter on the record a statement of that fact?] The mortgagees have contracted to sell the property, and cannot complete the sale because this judgment is a charge upon the property. The plaintiff was not justified in again registering the judgment after the defendant was discharged under the Insolvent Act. The 87th section of the 1 & 2 Vict. c. 110 requires every prisoner,

(a) 3 Beav. 309.

(b) 21 L. J., Q. B. 194.

before adjudication, to execute a warrant of attorney to confess judgment for the amount of the debts in his schedule, and if at any time the Court is satisfied that the prisoner is able to pay his debts they may permit execution to issue upon such judgment.

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POLLOCK, C. B.—We are all of opinion that the rule ought to be discharged. If we had power to grant the application I am not sure that, under the circumstances, we should exercise it. But I think that we have no power to interfere.

BRAMWELL, B.—I am of the same opinion. With all respect for the decision of *Erle, J.*, in *Lewis v. Dyson*, I think that we have no power to grant this application. The 1 & 2 Vict. c. 110, s. 13, says that a judgment in any of the superior Courts shall operate as a charge upon land, but by section 19 no judgment shall affect any lands unless a memorandum or minute of the judgment be entered in a book kept by the senior Master of the Court of Common Pleas. That Act, however, does not provide for making an entry in the Master's book of the satisfaction or discharge of a judgment; so that, even if the judgment debtor paid the debt, he could not under that statute obtain an entry of that fact (*a*). In this case the mortgagee of land, acquired by the judgment debtor subsequently to his discharge under the Insolvent Act, has contracted to sell it; but why are we to order the plaintiff to consent to this special entry being made in the Master's book because the vendor suffers some inconvenience for want of it? Mr. *Keane* says, that an entry on the record of the fact of the debtor being taken in execution would not answer the purpose, but I really doubt that; because, by the 16th section, if a judgment creditor

(*a*) The 23 & 24 Vict. c. 115 simplifies and amends the practice as to entering satisfaction on judgments.

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takes the judgment debtor in execution he is deemed to have relinquished all right and title to the benefit of any charge under that Act. At all events, if an entry were made on the record of the recovery of the judgment, the issuing of the writ of *ca. sa.*, the arrest of the defendant under it, and then a reference made to the proceedings in the Insolvent Court, whereby it would appear that the judgment debtor was discharged under the Insolvent Act, the record would shew that the judgment was no longer of any effect as a charge upon the land. If what has taken place amounts to a satisfaction of the judgment, there are means by which the debtor might procure satisfaction to be entered on the roll; but I think that the applicants have no right to ask us to order the plaintiff to consent to the entry which they require.

CHANNELL, B.—I am also of opinion that this rule should be discharged. The judgment which the plaintiff obtained in the action was a judgment of this Court, and the registration of that judgment in the book of the senior Master of the Court of Common Pleas was for the purpose of effecting a charge on land under the provisions of 1 & 2 Vict. c. 110. But that statute gives us no power to order the entry now asked for to be made. I guard myself against saying that we should refuse to interfere merely because the Master is an officer of another Court. I should say that for some purposes he is an officer of this Court. With regard to the argument that the plaintiff had no right to re-register the judgment after the debtor's discharge under the Insolvent Act, I apprehend that, if there was any improper registration, that is a matter which the Court of Common Pleas should correct.

PIGOTT, B., concurred.

Rule discharged.

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Nov. 24.

WOOLLETT had obtained a rule nisi to set aside the judgment signed herein, and all subsequent proceedings thereon, upon the ground that the plaintiff was an outlaw.

This was an action of trespass. The defendant pleaded (inter alia) a right of way, to which the plaintiff new assigned excess.

At the trial, before *Bramwell*, B., at the Hertfordshire Summer Assizes, 1863, a verdict was found for the plaintiff with 40*s.* damages, the Judge certifying for costs.

From the affidavits on which the rule was obtained, it appeared that the defendant had learnt just before trial that the plaintiff had been outlawed in the year 1836, in a civil action, at the suit of John Phillips Beavan, and that the outlawry was unreversed. Thereupon he applied to the Judge at nisi prius for leave to add a plea of outlawry, which was refused. Judgment was signed in August, but the taxation was adjourned over the Long Vacation, and had since stood over to enable the defendant to move.


From the plaintiff's affidavit, in answer, it appeared that he had returned to England in 1838, after a seven years' absence, and had resided since that date on his own estate in England. On the plaintiff's return Beavan had applied to him for payment of his debt. The plaintiff deposed to his belief that he had then paid it in full, and that no application for payment had since been made.

The outlawry of a plaintiff, when matter of plea in abatement and not of plea in bar, is after verdict no ground for setting aside the judgment: Nor, *semble*, when matter of plea in bar.

Quære, whether it be ground for staying proceedings on the judgment?

The plaintiff in an action of trespass *quare clausum fregit* was an outlaw on civil process. The defendant, on learning it just before trial, applied for leave to add a plea of outlawry, which was refused. The Court, after verdict, refused to set aside the judgment which had been signed by the plaintiff.

Hawkins, Sir *George Honeyman*, and *Archibald* shewed cause.—The Court will not entertain an objection of this

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nature if not taken at the first opportunity. To be available, it should have been pleaded in abatement." The plea of outlawry is no plea in bar unless the cause of action be forfeited. And it is not forfeited when the action is brought to recover damages which are uncertain (*a*). The rule on this subject is thus laid down in Co. Lit., 128 b. : —"If the ground or cause of the action be forfeited by the outlawry, then may the outlawry be pleaded in bar of the action; as in an action of debt, detinue, &c. But in real actions, or in personal, where damages be uncertain (as in trespass of battery, of goods, of *breaking his close*, and the like), and are not forfeited by the outlawry, there outlawry must be pleaded in disability of the person." The rule is laid down in similar terms in Com. Dig. tit. "Abatement" (E. 2), Viner's Abr. tit. "Utlawry" (I. a.) 3, and Bac. Abr. tit. "Outlawry" (D. 3), and per *Tracy, J.*, in *Copley v. Delaunoy* (*b*). As regards the forfeiture of lands by outlawry a distinction exists between outlawry for treason or felony and outlawry in civil cases. In civil cases outlawry works no forfeiture of the land. The king acquires no estate, but has only a pernaney of the profits: Bac. Abr. tit. "Outlawry" (D. 2). The case of *Puttenham v. Morris*, cited from Benloe's Reports, in Viner's Abr. tit. "Utlawry" (I. a.) 4, is in point:—"In replevin there was judgment by default, and a writ of inquiry of damages; upon the return of which writ, the defendant pleaded that the plaintiff was outlawed at the time of the action brought. Adjudged, that now he had no day to plead this plea, because it was after judgment in the same action:" Bendl. 206, pl. 242, Pasch., 14 Eliz., *Puttenham v. Morris*. The

(*a*) But by the judgment the damages are ascertained. If therefore the application here had been to *stay proceedings*, a different con-

sideration might have arisen by reason of the forfeiture of the judgment debt to the Crown.

(*b*) 2 Ld. Raym. 1056.

defendant, if too late to *plead*, is too late to raise the objection in any other mode. The bankruptcy of a plaintiff, if not pleaded, could not be taken advantage of, after judgment, by writ of *auditâ querelâ*. [*Bramwell*, B.—The only question here is whether the vindication of the law requires that this judgment should, for the time, be set aside, though it might of course be signed again as soon as the outlawry is reversed.] An outlaw is under no absolute disability to come into Court. He may do so to defend himself. The disability can only be taken advantage of in the proper mode. [*Bramwell*, B., referred to *Aldridge v. Buller* (a). There the objection was raised on the first occasion upon which it could succeed. No authority can be cited for the position that this objection is available at every successive step in the proceedings.

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Shee, Serjt., and *Woollett*, in support of the rule.—An outlaw cannot avail himself of the process of the Court in any way for his own benefit until the outlawry be reversed. The rule is thus stated in *Lush's Common Law Practice*, 2nd ed., p. 579:—"So long as the judgment of outlawry stands the outlaw is disabled from suing, prosecuting, or defending any action, or availing himself of the process or aid of the Courts in any way, or for any purpose whatsoever, for his own benefit, excepting only for the purpose of reversing the outlawry." Assuming the rule to be so far modified that an outlaw may defend himself if brought into Court by his opponent, he can at all events enforce no proceeding for his own benefit. Thus he cannot enforce payment of damages for a libel by proceeding by way of *scire facias* on a recognizance to the Crown: *Regina v. Lowe* (b). Nor can he move to have an attorney's bill taxed in which he is interested: *In re Mander* (c). Nor sue out a habeas

(a) 2 M. & W. 412.

(b) 8 Exch. 697.

(c) 6 Q. B. 867.

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corpus to charge in execution a plaintiff against whom he has obtained judgment as in case of a nonsuit : *Aldridge v. Buller* (a). The latter case is strongly in point to shew that whenever a fresh step is taken the outlaw's opponent may apply within reasonable time to set it aside. The Court there held the application to set aside the judgment too late, but when the outlaw took a fresh step in suing out the habeas corpus they interfered and set it aside. And Lord *Abinger*, in giving judgment, says:—"The principle is clearly laid down in the authorities, that an outlaw cannot appear in Court for any purpose but to reverse his outlawry ; that is a rule so long settled that we ought not now for the first time to create exceptions to it. Here the habeas corpus is nothing more than a mode by which the defendant seeks to pursue a remedy on his judgment ; he is making use of the process of the Court for his own benefit." 'There is no injustice to the plaintiff, since he can sign judgment again immediately, if he chooses to take the requisite steps for the reversal of his outlawry.

POLLOCK, C. B.—This is an application to set aside a judgment and all subsequent proceedings in a cause upon the ground of the plaintiff's outlawry. Applications of this nature are made to the discretion of the Court ; for the equitable interference of the Court can in no case, so far as I am aware, be claimed as matter of right. And the answer to the present application is, that the objection, which is now taken after verdict and judgment, is one which might have been taken by way of plea. The plea of outlawry, though it may be a good plea in bar when the cause of action is forfeited to the Crown, could not in my opinion have been here pleaded in bar, but only in abatement. The defendant did not so plead. Subsequently indeed, at nisi prius, he applied to the presiding Judge for

(a) 2 M. & W. 412.

leave to add this plea; but the Judge most properly refused the application. Now when the defendant has allowed the time for pleading in abatement to elapse, when the expense of a trial has been incurred, and the plaintiff has signed judgment, as he was entitled to do, an application is made to the Court, not to stay the proceedings, but to set aside the judgment. The Court, under these circumstances, will look into the case to see whether it be one which calls for its equitable interference. It appears that the outlawry is of thirty years' standing, that when the exigent was awarded and when the outlawry was perfected the plaintiff was abroad, and that the debt has in all probability long since been paid. I think the Court ought not to interfere to set this judgment aside, and that this rule should be discharged with costs.

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BRAMWELL, B.—I am of the same opinion. The objection which the defendant raises is of the most vexatious character; and it is one which might have been raised by plea in abatement. A defence of this nature should be pleaded at the proper time, whether by plea in abatement or in bar. It is urged however on the part of the defendant that this application is in due course; and the ground alleged, and for which there is some colour, is, that the Courts of law ought not to be appealed to by one who, being an outlaw, has no right to make use of their process. But, upon principle, I incline to think that it never was intended to give a defendant the unusual power either to plead the plaintiff's outlawry in abatement, or, omitting to do so, to take advantage of it afterwards by claiming to stay proceedings. I am aware that in the present case there is a statement in the affidavit that the outlawry was unknown to the defendant at the time of pleading. But that circumstance could only be important if this were a defence upon the merits.

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With regard to the authorities, most of them do not affect the point under discussion. *Puttenham v. Morris* (a) proceeded on the ground that the defendant could have no day to *plead* after judgment. In the case of *In re Mander*, where the application was to tax an attorney's bill, the objection was raised at the first opportunity. The only case which does appear to bear upon the question whether outlawry is a disability of which the defendant may avail himself, either at the time for pleading or at any subsequent stage of the proceedings, is *Aldridge v. Buller* (b). The decision in that case was correct, but with great submission I dissent from some of the reasons which are assigned by the Court in support of their judgments. The defendant in that case, notwithstanding he was an outlaw, when brought into Court by the plaintiff was entitled to defend himself. The rule for judgment as in case of a nonsuit was a mode of disposing of the action, and a step in the defence. Consequently, when the defendant issued the habeas corpus ad satisfaciendum to charge the plaintiff in execution, he *for the first time* took a step for his own benefit, which was not for the purpose of getting rid of the action. And even there *Parke*, B., entertained a doubt whether the objection were not too late. I think that upon this ground the case is distinguishable, and that it does not preclude us from holding that an objection of this nature, to be available, must be taken at the first opportunity.

Again, if the argument used for the defendant were correct, the defendant might at any time have moved to set aside the notice of trial. This brings me to another objection. Assuming the argument correct that a defendant can at any time interpose to prevent further proceedings, his application ought to be to stay proceedings, not to set them aside. For the outlaw has done nothing irregular in sign-

(a) Benl. 206, pl. 242.

(b) 2 M. & W. 412.

ing judgment. It may no doubt be said that this objection might have been taken in *Aldridge v. Buller* (a), since the application, which was there successfully made, was not to stay proceedings upon the habeas corpus, but to set it aside. But this point does not appear to have been made in that case.

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In the result, I am of opinion that there are two answers to this application. The first is one of substance, viz., that the defendant must plead the outlawry as matter of plea in abatement only, and if he omits to do so he cannot afterwards stay the proceedings. The second is that, assuming the defendant can at any time interpose to prevent further proceedings, he must apply to stay proceedings, not to set them aside.

CHANNELL, B.—I agree that this rule should be discharged with costs. The application made to my brother *Bramwell* at the trial was in my opinion properly refused. If so, the defendant's position is the same as if the application had not been made. Now the defendant had a right to plead this plea at the proper time in abatement or in bar. If it were necessary to decide as to the form of plea, I should say without hesitation that it must have been pleaded in abatement and not in bar. But the defendant did neither. In the absence of any plea, either in abatement or in bar, I am unable to see why the signing judgment, which is in one sense the act of the Court, was wrong. Yet the rule has been obtained to *set aside* the judgment and the subsequent proceedings.

It is true that, at first sight, the language of the Court in *Aldridge v. Buller* (a) appears much in favour of the defendant's argument. But that case does not in my opinion govern the present. The defendant there was an outlaw;

(a) 2 M. & W. 412.

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he was brought into Court by the plaintiff; and, when brought into Court, he had a right to defend himself against any proceedings which were instituted against him. For it would be applying the rule to a monstrous extent to hold that an outlaw is not to be allowed to defend himself against the claim of a plaintiff who has brought him into Court. Non constat that, if he became entitled to costs, he would insist on his right. When however the defendant proceeded to enforce his judgment by suing out the habeas corpus to charge the plaintiff in execution, a different consideration arose. The Court might then fairly say that, upon an application being promptly made, it would grant relief. The plaintiff had no opportunity there of taking the objection on which the case was ultimately decided at any earlier stage. Here there have been pleadings and a trial; and the defendant has had the opportunity once if not twice.

I think therefore the rule is, that one who relies on the objection of a personal incapacity to sue, ought to object at the proper time, whether by plea in abatement or in bar, and not, as here, to allow the proceedings to go on, and additional expenses to be incurred. It is to be observed that the present application, which is made to the equitable jurisdiction of the Court, is not like the writ of *audita querelâ*, by which relief may be obtained when, after judgment, some matter has intervened which affects the judgment.

PIGOTT, B.—I am of opinion that this application is not entitled to the indulgence of the Court. The defendant is at this late stage of the proceedings attempting to obtain the advantage which he has lost by neglecting to plead in abatement, and I think we ought not to assist him. I also agree that, upon the form of this rule, it ought to be discharged.

Rule discharged.

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PEEK, Appellant, THE WATERLOO AND SEAFORTH
LOCAL BOARD OF HEALTH, Respondents.

Nov. 10.

CASE stated by two justices of the county of Lancaster, under the 20 & 21 Vict. c. 43, in substance as follows:—

A Local Board of Health for the district of Waterloo with Seaforth, in the county of Lancaster, was duly constituted under the provisions of the Public Health Act, 1848 (11 & 12 Vict. c. 63).

Sect. 2 of the said Act enacts: “ . . . The word ‘owner’ shall mean the person for the time being receiving the rack rent of the lands or premises in connection with which the said word is used, whether on his own account or as agent or trustee for any other person, or who would so receive the same if such lands or premises were let at a rack rent.”

Sect. 69 enacts: “That in case any present or future street, or any part thereof (not being a highway), be not sewered, levelled, paved, flagged and channelled to the satisfaction of the Local Board of Health, such Board may, by notice in writing to the respective owners or occupiers of the premises fronting, adjoining, or abutting upon such parts thereof as may require to be sewered, levelled, paved, flagged, or channelled, require them to sewer, level, pave, flag or channel the same within a time to be specified in such notice; and if such notice be not complied with, the said Local Board may, if they shall think fit, execute the works mentioned or referred to

The definition of an “owner” of premises let at a rack rent, in sect. 2 of the Public Health Act, 1848 (11 & 12 Vict. c. 63), is satisfied by a person who is de facto receiving the rack rent.

Therefore where A., a person de facto receiving such a rent, was served by a Local Board of Health with a notice to sewer under sect. 69 of the same Act (by which service is to be upon the “owner” or “occupier”), and on his failure to comply with the notice the Local Board executed the sewerage works, and charged the expenses under sect. 62 of the Local Government Act, 1858,

(21 & 22 Vict. c. 98), to B., the appellant, who was owner, when the works were completed, B. (though his title to the premises had accrued prior to the service of the notice, and the notice had not been served on him, nor had he any knowledge of it till after the completion of the works,) was held liable for the expenses incurred.

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therein; and the expenses incurred by them in so doing shall be paid by the owners in default" as therein specified.

Sect. 62 of the Local Government Act, 1858 (21 & 22 Vict. c. 98), enacts: "Where the Local Board have incurred expenses, for the repayment whereof the owner of the premises for or in respect of which the same are incurred is made liable, either by application of or agreement with the owner, or by the Public Health Act, 1848, or any Act incorporated therewith, or this Act, the same may be recovered from the person who is owner of such premises when the works are completed for which such expenses have been incurred, in the manner provided by the Public Health Act, 1848, and such expenses shall be a charge on the premises in respect of which they were incurred, and shall bear interest at the rate of five pounds per cent. per annum till payment thereof."

At a petty sessions held at Liverpool, in and for the division of the county within which the district of the Waterloo with Seaforth Local Board of Health is situate, on the 23rd of February, 1863, an information was preferred by the clerk to the respondents, under the 69th section of the Public Health Act, 1848, charging that one Richard Formby was, on the 15th of May, 1861, the owner of certain premises situate in a certain road running from &c. to &c., within the district of the Waterloo with Seaforth Local Board of Health, which road was not then sewered, levelled, &c., to the satisfaction of the respondents, and that the respondents had by a certain writing, dated the 15th of May, 1861, sealed with their common seal and signed by five of their members, given the said Richard Formby notice as owner of the said premises fronting the said road, within the space of fourteen days from the date of the said notice, to sewer, level, &c., so much of the said road as the said premises fronted; and that in case the said

Richard Formby failed to comply with the said notice within such time, the respondents might, if they should think fit, execute the said sewerage, levelling, &c., and the expenses incurred by them in so doing must be paid by the said Richard Formby together with the owners in default, if any, as therein mentioned. The information further alleged that neither the said Richard Formby, nor any other person, did within fourteen days after the date of the said notice execute the sewerage, levelling, &c., mentioned in the said notice, whereupon the respondents executed the same; and that the appellant, subsequently to the date and service of the said notice, became and was at the time of the completion of the said works the owner of the said premises; and that the surveyor of the respondents had apportioned the costs of executing such sewerage among the owners of premises fronting the said road according to the frontage of their respective premises, and had declared the appellant's proportion to be 115*l*. 8*s*., which had been demanded of the appellant, and which he refused to pay (and which the respondents had not declared to be private improvement expenses), contrary to the statute in such case made and provided.

Upon the hearing of the information it was proved on the part of the respondents, and was found as a fact:

That the said road was not a highway repairable at the public expense at the date and service of the said notice to sewer of the 15th of May, 1861.

That Richard Formby did not reside within the respondents' district on the date or at the time of service of the said notice, which was served by being directed to him and transmitted through the post office.

That the premises therein described were occupied by one John Caddick, together with certain other lands, and that Richard Formby received the rent of the said premises

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and the other lands occupied by John Caddick at the date of the notice, and therefrom up to the 2nd of February, 1862.

That Richard Formby gave John Caddick a notice, dated the 30th of July, 1861, to deliver up to him possession of the said premises and of the other lands so occupied by him on the 2nd of February, 1862 (on the expiration of which notice John Caddick gave up possession), and that, on the 11th of April, 1862, Richard Formby received the rent for the same up to the 2nd of February, 1862.

That the receipt for such rent was produced, and appeared as if Richard Formby received the said rent as absolute owner.

It was admitted by the appellant that the notice of the 15th of May, 1861, had been served on Richard Formby, the work duly executed, and the apportionment of 115*l.* 8*s.* correctly made.

It was proved on the part of the appellant and was found as a fact :

That the appellant became and was the owner of the said premises under a conveyance dated the 31st of October, 1860, having purchased them from one James Formby, and that he never had any knowledge of the notice of the 15th of May, 1861, until the said sewerage works had been executed.

That the appellant after such purchase had by himself or his servants driven cattle off the land purchased, believing that such cattle belonged to John Caddick, but that he never informed John Caddick or the respondents that he had purchased the land described in the notice to sewer.

That the land comprised in the said notice is not of a pasturable nature for horned cattle, but donkeys will graze there, and the appellant turned his donkeys thereon, several of which he kept for domestic purposes, but which fact he

did not communicate to John Caddick. The land mentioned in the said notice has never been set apart or railed off by the appellant.

The justices were of opinion that Richard Formby was in receipt of the rent of the said premises on the 15th of May, 1861, the date of the notice to sewer; and that the appellant was the owner thereof at the time of the completion of the said sewerage works, and was liable for the payment of the costs of such sewerage works, and convicted him accordingly.

The question for the opinion of the Court is, whether the justices were correct in point of law, in finding that the appellant was bound by the notice served on Richard Formby on the 15th of May, 1861.

The case came on for argument on the 8th of June, 1863, when it was remitted to the justices to be amended by stating the date when the works in question were completed. The case, as amended, stated that the works were completed on the 13th of March, 1862.

C. E. Pollock, for the appellant.—It is conceded that, if the notice to sewer was served upon one who answers the description of an “owner” in sect. 2 of the Public Health Act, 1848, the appellant is liable under sect. 62 of the Local Government Act, 1858. But the question is, whether the mere receipt of rent, unaccompanied by any legal right to receive it, will constitute an “owner” within the meaning of the former Act. Such a construction is not needed to facilitate the service of the notice, since the section which requires service on the owner provides the alternative of serving the occupier. Moreover, the adoption of that construction here would be productive of hardship. The appellant was not merely the *de jure* owner when the notice was served, but had exercised acts of ownership on the land. He was therefore an owner entitled to notice. Convenience requires that the 2nd section be construed strictly.

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So construed, it does not apply. Richard Formby did not receive the rent "as agent or trustee for any other person," and he could not legally receive it "on his own account," although he no doubt assumed to do so. The case does not state whether in continuing to collect the rent he was acting under a mistake. If so, he is not within the statute. Still less, if there were no mistake, and he in fraud continued to collect the rent. The case, however, does not expressly find either fraud or mistake.

L. Temple, for the respondents.—The sole question is, whether the requisitions of the Public Health Act, 1848, as to the service of the notice, have been properly complied with. Now the notice was served upon the apparent owner, to whom the rent was paid, who gave receipts for it in his own name, and who afterwards gave a notice to quit on which the tenant acted. The object of the legislature was to render service on the de facto owner sufficient, so as to avoid the necessity of inquiries into the validity of the owner's title. [*Pigott*, B.—There could be no such necessity here, since the Act provides the alternative of serving the occupier.] In serving the occupier the same difficulty might arise. The occupier might be a wrongdoer as well as the owner. If it be said that the statute contemplates de facto occupation, the answer is, that it equally contemplates de facto ownership. An "owner," as defined in the 2nd section of the Public Health Act, 1848, is not "the person entitled to receive," but "the person for the time being receiving" the rack rent of the premises. This language points to de facto ownership. The appellant, although he had no right to retain the money, was receiving it "on his own account" within the meaning of the 2nd section.

C. E. Pollock, in reply.—The 2nd section defines the "owner" as "the person for the time being receiving the

rack rent of the lands or premises, &c., or who would receive the same if such lands or premises were let at rack rent." The case does not state the rent here to be a rack rent. By "the person who would receive, &c.," must be meant "the person *entitled* to receive, &c.," which points to the appellant. [*Bramwell*, B.—There is, I presume, no doubt in the present case that the rent paid by the tenant was a rack rent.]

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POLLOCK, C. B.—As to the character of the rent, I assume no question arises, and, if so, I am of opinion that there should be judgment for the respondents. The question which arises is, whether the notice to sewer was served upon the proper person. I regret indeed that the occupier was not served, since, if that had been done, the present difficulty might have been avoided. But the person who was served was the supposed owner, and, as he was actually receiving the rent when the notice was served, I am of opinion that he was an "owner" within the definition of the statute.

BRAMWELL, B.—I am of the same opinion. It is admitted that, at the time when the works were completed, the appellant was owner. Consequently, he was liable for the expenses incurred, if the notice had been correctly served. Now the statute permits service to be effected either upon the owner or the occupier. The appellant's counsel contends that the owner must be a person *rightfully* receiving the rent "on his own account or as agent or trustee." But the statute does not require a *rightful* receiver of the rent any more than a *rightful* occupier, and was obviously framed with a view to a de facto state of things. The words "on his own account or as agent or trustee for any other person," seem to have been inserted to prevent the objection that the receiver of the rent must

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not be a mere agent, but a person receiving the rent "on his own account." The service is, in my judgment, properly made if made upon the person de facto receiving the rent, whether he is receiving it rightfully or wrongfully, and whether in his own right or in the right of another. This is also the more convenient construction. Here it was the appellant's own fault that he was not in possession of the land and in the receipt of the rent, and, if so, I think he is under no hardship.

CHANNELL, B.—The appellant's liability is clear, if the notice to sewer was served upon the right person, and in my judgment the person served sufficiently answers the description of an "owner" in the 2nd section of the Public Health Act, 1848. The section points to a de facto receiver; and one who receives the rent "on his own account," though wrongfully in the sense that he has no right to retain the money is, I think, within its meaning. Now the person here served assumed to receive the rent "on his own account" and afterwards gave notice to quit to the occupier, who quitted accordingly. The service of the notice to sewer was sufficient to initiate the proceedings, and this is all that is requisite. I am not indeed insensible to the argument that there is some hardship on the appellant, but looking to the object which the legislature had in view I do not think that argument ought to prevail.

PIGOTT, B.—The only doubt which I have entertained has been whether the respondents have sufficiently complied with the requisition of the statute as to notice, which is a condition precedent to the appellant's liability. Although my mind is not free from doubt, I am disposed to think they have done so, in treating as owner the apparent owner, who was in receipt of the rent, and who afterwards

gave the occupier notice to quit. When the works were completed, the appellant had asserted his right to the premises, and was in possession; so that the respondents were entitled under the Local Government Act, 1858, to look to him for payment. As to the argument which has been founded on the hardship to the appellant, I think that if any hardship exists it is of the appellant's own creating

Judgment for the respondents.

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PHILLIPS v. WARD and Others.

Nov. 11.

DECLARATION.—For money payable by the defendants to the plaintiff, for work, &c., done by the plaintiff as attorney and solicitor of and otherwise for the defendants, upon their retainer, and for fees due in respect thereof, and for materials, &c., provided, and for money lent, money paid, and on accounts stated.

Plea.—That the plaintiff ought not to be admitted to say that any money is payable by the defendants to the plaintiff for the causes of action in the declaration mentioned; because they say that the said retainer was a joint retainer by the defendants in this action and one John Bazalgette; and that the said fees became due, and the said materials and necessary things were provided by the plaintiff for the defendants, under and in respect of the said joint retainer, and not otherwise; and that the said money was lent by the plaintiff to, and paid by the plaintiff for, the defendants jointly with the said John Bazalgette, and not otherwise; and the said accounts were stated of and concerning the aforesaid transactions between the plaintiff and the defendants jointly with the said John Bazalgette, and not other-

A judgment recovered by one of several joint debtors cannot be pleaded as a defence to a subsequent action against the other joint debtors in respect of the same cause, unless the plea shows that the judgment was recovered on a ground which operated as a discharge of all.

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wise; and that before this suit the plaintiff brought an action against the said John Bazalgette in the Court of Common Pleas for the same causes of action as in the declaration mentioned; and such proceedings were thereupon had in that action that afterwards and before this suit it was considered by the judgment of the said Court in the said action that the plaintiff should take nothing by his writ for or in respect of the said causes of action; and the said judgment still remains in force; and this the defendants are ready to verify. Wherefore they pray judgment if the plaintiff ought to be admitted to say that any money is payable by the defendants to the plaintiff for the causes of action in the declaration mentioned.


Demurrer, and joinder therein.

Hayes, Serjt., in support of the demurrer.—A plaintiff who has failed in an action against one of several joint contractors is not thereby estopped from suing the others. An estoppel would arise in another action between the same parties for the same cause, but it is a novel plea that, because the plaintiff has sued the wrong party, he is estopped from suing the right one. *King v. Hoare* (a) is the converse of this case. There it was held that a judgment (without satisfaction) recovered against one of two joint debtors was a bar to an action against the other. But that decision proceeded on the ground that a judgment changes the cause of action into matter of record, and the inferior remedy is merged in the higher. It is like the case of a judgment against one of several joint tort-feazors, which, of itself, without execution, is a bar to an action against the others for the same cause. In an action of contract against A., he cannot plead in abatement the pendency of another action for the same cause against B.: *Henry v. Goldney* (b);

(a) 13 M. & W. 494.

(b) 15 M. & W. 494.

but the proper course is to plead the non-joinder of the contractor in abatement. This plea merely says that the judgment in the former action was that the plaintiff should take nothing by his writ; but that may have been on the ground of a personal discharge, as by bankruptcy or insolvency, or upon some ground which would not affect the merits of this case. [*Bramwell*, B.—It may have been on the ground that the plaintiff had not delivered a signed bill as required by the 6 & 7 Vict. c. 73, s. 37. *Pigott*, B.—Or on the ground of infancy. *Channell*, B., referred to *Buckland v. Johnson* (a).]

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Bompas, in support of the plea.—The plea discloses good matter of estoppel, for it shews that the plaintiff's claim has been adjudicated upon in an action against a co-contractor. That is the distinction between *King v. Hoare* (b) and *Henry v. Goldney* (c). In the former case judgment had been recovered, and the matter had passed in rem judicatam; but in the latter there was merely the pendency of another action for the same cause against another party. The Court, having already pronounced judgment as to the validity of the plaintiff's claim, will not again adjudicate upon it in successive actions against each co-contractor. [*Bramwell*, B.—The plea in substance alleges that the plaintiff brought an action against another co-contractor and failed. Is that properly pleaded by way of estoppel?] It may be supported as a plea in bar. The special commencement and conclusion may be treated as surplusage. A plea on equitable grounds may be read as a good legal defence: *Vorley v. Barrett* (d). If the plaintiff had recovered only one farthing in the former action that judgment might have

(a) 15 C. B. 145.

(b) 13 M. & W. 494.

(c) 15 M. & W. 494.

(d) 1 C. B., N. S. 225.

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been pleaded in bar to this action: *King v. Hoare* (a); and the same principle applies where he has recovered nothing. [*Bramwell*, B.—How does it appear that the former action was not decided on the ground of some personal disability?] If so, that should have been replied. A similar plea was pleaded in *Gordon v. Whitehouse* (b), and the plaintiff replied specially. [*Channell*, B.—A plea by way of estoppel should set out fully the facts which create the estoppel.] In pleading a judgment recovered, it is not necessary to set forth the whole proceedings: 1 Wms. Saund. 91 a, note (2). The defendant could not plead in abatement the non-joinder of the other joint debtor, because he is beyond the jurisdiction of the Court: 3 & 4 Wm. 4, c. 42, s. 8.—He also referred to *Stackwood v. Dunn* (c).

Hayes, Serjt., was not called upon to reply.

POLLOCK, C. B.—We are all of opinion that the plea cannot be sustained. This is an action against persons who are joint debtors with another person not now sued; and because he was fortunate enough to succeed by some plea or other in an action brought by the plaintiff against him for the same cause, the defendants seek to avail themselves of his immunity. Now, for anything which appears on the face of this plea, he may have succeeded on matter of defence, which, though good with respect to him, is not open to his co-debtors. The consequence is that the plea is bad, and the plaintiff entitled to judgment.

BRAMWELL, B.—I am also of opinion that the plea is bad. No doubt, if a person jointly liable with others succeeds in an action against him alone by pleading a release or pay-

(a) 13 M. & W. 494.

(b) 18 C. B. 747.

(c) 3 Q. B. 822.

ment, that would afford a good defence to an action against the other joint debtors—whether pleaded in bar or by way of estoppel seems unimportant—for a release to one is a release to all, and payment by one is a discharge of all. Therefore, in some cases, a judgment recovered by one of several joint debtors may be pleaded in an action against the others. But this plea does not shew that the former action was successfully resisted on some ground common to all the joint debtors; but only that the Court gave judgment for the defendant, which may have been on some ground purely personal, as infancy, bankruptcy, or insolvency. Then it is said that the plaintiff should have replied specially, shewing how it was that he could maintain this action though he had failed in the other. But in my opinion that is not so. The plea ought to state a complete defence, and not call upon the plaintiff to answer matter imperfectly pleaded.

CHANNELL, B.—I am of the same opinion. The defendants plead a judgment recovered by a joint debtor in a former action for the same cause; and I think it incumbent on the defendants to shew by their plea that the judgment in that action is inconsistent with their liability in this action. But, so far as this plea states, the judgment for the defendant in the former action may have proceeded on a ground which, though affording a perfect defence as regards him, does not affect the liability of the present defendants.

PIGOTT, B.—I am of the same opinion. This plea is in form a plea in estoppel; but, whether it be considered in substance as a plea in estoppel or a plea in bar, I think it bad, for it is perfectly consistent with every allegation in it that, though the defendant in the other action recovered

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judgment against the plaintiff, the defendants in this action are still liable. It is said that the plaintiff ought to have replied specially, but I am of opinion that the defendants ought by their plea to shew that the judgment in the former action proceeded on a ground which operated as a discharge of all the joint debtors.

Judgment for the plaintiff.

Nov. 25.

BYRNE v. BOADLE.

The plaintiff was walking in a public street past the defendant's shop when a barrel of flour fell upon him from a window above the shop, and seriously injured him —

Held sufficient *prima facie* evidence of negligence for the jury, to cast on the defendant the onus of proving that the accident was not caused by his negligence.

DECLARATION.—For that the defendant, by his servants, so negligently and unskilfully managed and lowered certain barrels of flour by means of a certain jigger-hoist and machinery attached to the shop of the defendant, situated in a certain highway, along which the plaintiff was then passing, that by and through the negligence of the defendant, by his said servants, one of the said barrels of flour fell upon and struck against the plaintiff, whereby the plaintiff was thrown down, wounded, lamed, and permanently injured, and was prevented from attending to his business for a long time, to wit, thence hitherto, and incurred great expense for medical attendance, and suffered great pain and anguish, and was otherwise damnified.

Plea.—Not guilty.

At the trial before the learned Assessor of the Court of Passage at Liverpool, the evidence adduced on the part of the plaintiff was as follows:—A witness named Critchley said: “On the the 18th July, I was in Scotland Road, on the right side going north, defendant's shop is on that side. When I was opposite to his shop, a barrel of flour fell from a window above in defendant's house and shop, and knocked

the plaintiff down. He was carried into an adjoining shop. A horse and cart came opposite the defendant's door. Barrels of flour were in the cart. I do not think the barrel was being lowered by a rope. I cannot say: I did not see the barrel until it struck the plaintiff. It was not swinging when it struck the plaintiff. It struck him on the shoulder and knocked him towards the shop. No one called out until after the accident." The plaintiff said: "On approaching Scotland Place and defendant's shop, I lost all recollection. I felt no blow. I saw nothing to warn me of danger. I was taken home in a cab. I was helpless for a fortnight." (He then described his sufferings.) "I saw the path clear. I did not see any cart opposite defendant's shop." Another witness said: "I saw a barrel falling. I don't know how, but from defendant's." The only other witness was a surgeon, who described the injury which the plaintiff had received. It was admitted that the defendant was a dealer in flour.

It was submitted, on the part of the defendant, that there was no evidence of negligence for the jury. The learned Assessor was of that opinion, and nonsuited the plaintiff, reserving leave to him to move the Court of Exchequer to enter the verdict for him with 50% damages, the amount assessed by the jury.

Little, in the present Term, obtained a rule nisi to enter the verdict for the plaintiff, on the ground of misdirection of the learned Assessor in ruling that there was no evidence of negligence on the part of the defendant; against which

Charles Russell now shewed cause.—First, there was no evidence to connect the defendant or his servants with the occurrence. It is not suggested that the defendant himself was present, and it will be argued that upon these pleadings it is not open to the defendant to contend that his servants were not engaged in lowering the barrel of flour. But the

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declaration alleges that the defendant, by his servants, so negligently lowered the barrel of flour, that by and through the negligence of the defendant, by his said servants, it fell upon the plaintiff. That is tantamount to an allegation that the injury was caused by the defendant's negligence, and it is competent to him, under the plea of not guilty, to contend that his servants were not concerned in the act alleged. The plaintiff could not properly plead to this declaration that his servants were not guilty of negligence, or that the servants were not his servants. If it had been stated by way of inducement that at the time of the grievance the defendant's servants were engaged in lowering the barrel of flour, that would have been a traversable allegation, not in issue under the plea of not guilty. *Mitchell v. Crassweller (a)* and *Hart v. Crowley (b)* are authorities in favour of the defendant. Then, assuming the point is open upon these pleadings, there was no evidence that the defendant, or any person for whose acts he would be responsible, was engaged in lowering the barrel of flour. It is consistent with the evidence that the purchaser of the flour was superintending the lowering of it by his servant, or it may be that a stranger was engaged to do it without the knowledge or authority of the defendant. [*Pollock, C. B.*—The presumption is that the defendant's servants were engaged in removing the defendant's flour; if they were not it was competent to the defendant to prove it.] Surmise ought not to be substituted for strict proof when it is sought to fix a defendant with serious liability. The plaintiff should establish his case by affirmative evidence.

Secondly, assuming the facts to be brought home to the defendant or his servants, these facts do not disclose any evidence for the jury of negligence. The plaintiff was bound to give affirmative proof of negligence. But there

(a) 13 C. B. 237.

(b) 12 A. & E. 378.

was not a scintilla of evidence, unless the occurrence is of itself evidence of negligence. There was not even evidence that the barrel was being lowered by a jigger-hoist as alleged in the declaration. [*Pollock*, C. B.—There are certain cases of which it may be said *res ipsa loquitur*, and this seems one of them. In some cases the Courts have held that the mere fact of the accident having occurred is evidence of negligence, as, for instance, in the case of railway collisions.] On examination of the authorities, that doctrine would seem to be confined to the case of a collision between two trains upon the same line, and both being the property and under the management of the same Company. Such was the case of *Skinner v. The London, Brighton and South Coast Railway Company* (a), where the train in which the plaintiff was ran into another train which had stopped a short distance from a station, in consequence of a luggage train before it having broken down. In that case there must have been negligence, or the accident could not have happened. Other cases cited in the text-books, in support of the doctrine of presumptive negligence, when examined, will be found not to do so. Amongst them is *Carpue v. The London and Brighton Railway Company* (b), but there, in addition to proof of the occurrence, the plaintiff gave affirmative evidence of negligence, by shewing that the rails were somewhat deranged at the spot where the accident took place, and that the train was proceeding at a speed which, considering the state of the rails, was hazardous. Another case is *Christie v. Griggs* (c), where a stage-coach on which the plaintiff was travelling broke down in consequence of the axle-tree having snapped asunder. But that was an action on the *contract* to carry safely, and one of the counts imputed the accident to the insufficiency of the

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(a) 5 Exch. 787.

(b) 5 Q. B. 747.

(c) 2 Camp. 79.

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coach, of which its breaking down would be evidence for the jury. [*Pollock*, C. B.—What difference would it have made, if instead of a passenger a bystander had been injured?] In the one case the coach proprietor was bound by his *contract* to provide a safe vehicle, in the other he would only be liable in case of negligence. The fact of the accident might be evidence of negligence in the one case, though not in the other. It would seem, from the case of *Bird v. The Great Northern Railway Company* (a), that the fact of a train running off the line is not *prima facie* proof where the occurrence is consistent with the absence of negligence on the part of the defendants. Later cases have qualified the doctrine of presumptive negligence. In *Cotton v. Wood* (b) it was held that a Judge is not justified in leaving the case to the jury where the plaintiff's evidence is equally consistent with the absence as with the existence of negligence in the defendant. In *Hammack v. White* (c) *Erle*, J., said that he was of opinion "that the plaintiff in a case of this sort was not entitled to have the case left to the jury unless he gives some affirmative evidence that there has been negligence on the part of the defendant." [*Pollock*, C. B.—If he meant that to apply to *all* cases, I must say, with great respect, that I entirely differ from him. He must refer to the mere nature of the accident in that particular case. *Bramwell*, B.—No doubt, the presumption of negligence is not raised in every case of injury from accident, but in some it is. We must judge of the facts in a reasonable way; and regarding them in that light we know that these accidents do not take place without a cause, and in general that cause is negligence.] The law will not presume that a man is guilty of a wrong. It is consistent with the facts proved that the defendant's servants were using

(a) 28 L. J., Exch. 3.

(b) 8 C. B. N. S. 568.

(c) 11 C. B. N. S. 588. 594.

the utmost care and the best appliances to lower the barrel with safety. Then why should the fact that accidents of this nature are sometimes caused by negligence raise any presumption against the defendant? There are many accidents from which no presumption of negligence can arise. [*Bramwell*, B.—Looking at the matter in a reasonable way it comes to this—an injury is done to the plaintiff, who has no means of knowing whether it was the result of negligence; the defendant, who knows how it was caused, does not think fit to tell the jury.] Unless a plaintiff gives some evidence which ought to be submitted to the jury, the defendant is not bound to offer any defence. The plaintiff cannot, by a defective proof of his case, compel the defendant to give evidence in explanation. [*Pollock*, C. B.—I have frequently observed that a defendant has a right to remain silent unless a *prima facie* case is established against him. But here the question is whether the plaintiff has not shewn such a case.] In a case of this nature, in which the sympathies of a jury are with the plaintiff, it would be dangerous to allow presumption to be substituted for affirmative proof of negligence.

Littler appeared to support the rule, but was not called upon to argue.

POLLOCK, C. B.—We are all of opinion that the rule must be absolute to enter the verdict for the plaintiff. The learned counsel was quite right in saying that there are many accidents from which no presumption of negligence can arise, but I think it would be wrong to lay down as a rule that in no case can presumption of negligence arise from the fact of an accident. Suppose in this case the barrel had rolled out of the warehouse and fallen on the plaintiff, how could he possibly ascertain from what cause it occurred? It is

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the duty of persons who keep barrels in a warehouse to take care that they do not roll out, and I think that such a case would, beyond all doubt, afford *primâ facie* evidence of negligence. A barrel could not roll out of a warehouse without some negligence, and to say that a plaintiff who is injured by it must call witnesses from the warehouse to prove negligence seems to me preposterous. So in the building or repairing a house, or putting pots on the chimneys, if a person passing along the road is injured by something falling upon him, I think the accident alone would be *primâ facie* evidence of negligence. Or if an article calculated to cause damage is put in a wrong place and does mischief, I think that those whose duty it was to put it in the right place are *primâ facie* responsible, and if there is any state of facts to rebut the presumption of negligence, they must prove them. The present case upon the evidence comes to this, a man is passing in front of the premises of a dealer in flour, and there falls down upon him a barrel of flour. I think it apparent that the barrel was in the custody of the defendant who occupied the premises, and who is responsible for the acts of his servants who had the controul of it; and in my opinion the fact of its falling is *primâ facie* evidence of negligence, and the plaintiff who was injured by it is not bound to shew that it could not fall without negligence, but if there are any facts inconsistent with negligence it is for the defendant to prove them.

BRAMWELL, B.—I am of the same opinion.

CHANNELL, B.—I am of the same opinion. The first part of the rule assumes the existence of negligence, but takes this shape, that there was no evidence to connect the defendant with the negligence. The barrel of flour fell from a warehouse over a shop which the defendant occupied, and

therefore *prima facie* he is responsible. Then the question is whether there was any evidence of negligence, not a mere scintilla, but such as in the absence of any evidence in answer would entitle the plaintiff to a verdict. I am of opinion that there was. I think that a person who has a warehouse by the side of a public highway, and assumes to himself the right to lower from it a barrel of flour into a cart, has a duty cast upon him to take care that persons passing along the highway are not injured by it. I agree that it is not every accident which will warrant the inference of negligence. On the other hand, I dissent from the doctrine that there is no accident which will in itself raise a presumption of negligence. In this case I think that there was evidence for the jury, and that that the rule ought to be absolute to enter the verdict for the plaintiff.

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PIGOTT, B.—I am of the same opinion.

Rule absolute.

THE KEYNSHAM BLUE LIAS LIME COMPANY (LIMITED)
 v. BAKER.

Nov. 25.

IN this case an application had been made to a Judge at Chambers for an order that the plaintiff recover his costs.

A Company incorporated under the Joint Stock Companies Acts, for the manufacture and sale of

The affidavit in support of the application stated that the action was brought to recover 2*l.* 14*s.* 3*d.* for goods sold and

goods, "dwells," within the meaning of the 9 & 10 Vict. c. 95, s. 128, at the place of manufacture and sale, and not at their registered office.

A joint stock Company sold and delivered goods to the defendant at their works at Keynsham, in Somersetshire, seven miles distant from the place where the defendant resided and carried on his business. The registered office of the Company, where the directors met and transacted all their business, was in London. The Company being in the course of winding-up, the official liquidator, who dwelt and carried on business in London, sued the defendant in a superior Court for the price of the goods, and recovered judgment by default for a sum under 20*l.*—*Held*, that the plaintiff was not entitled to costs.

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delivered, and judgment was signed in default of appearance.

The Company was in course of being wound up under the provisions of the Companies' Act, 1862, and the action was brought by the official liquidator in the name and on behalf of the Company.

At the time of the commencement of the action, the liquidator dwelt in the county of Middlesex, and carried on business in the city of London, and he dwelt and carried on business at the city of Bristol, the respective dwelling and places of business being more than twenty miles apart from each other. The plaintiffs were a Company registered and incorporated under the "Joint Stock Companies Acts, 1856, 1857." The objects for which the Company was established were, the quarrying and calcining of limestone and gypsum, and the making and vending of lime; the manufacture of plaster of Paris, and the purchasing, leasing, or otherwise acquiring and holding of any freehold or leasehold lands or houses, quarries, mines, or mineral rights in the county of Somerset, or elsewhere in England and Wales; and generally the performance of all such acts, matters and things as were incidental or otherwise conducive to the attainment of the before mentioned objects, or any of them, and such additional or extended objects as the Company might from time to time by special resolution determine and resolve.

By Article 2 of the Memorandum of Association of the Company it was provided that the registered office of the Company shall be established in England, and the registered office is at No. 2, Winchester Buildings, in the city of London, more than twenty miles from the defendant's dwelling and place of business. Previously to the resolution of the shareholders to wind up voluntarily the Company, and whilst the Company continued to carry out the

objects for which it was established, the office of the secretary of the Company was at No. 2, Winchester Buildings, where alone the meetings of the directors of the Company were held, and where all their business was transacted for the regulation and guidance of the undertaking.

At the time of the commencement of the action no works were being carried on by the Company or by the liquidator, other than selling the lime and cement previously manufactured, and there was no agent or servant of the Company, or any other person, at the works or elsewhere, within twenty miles from the dwelling or place of business of the defendant, authorized to commence proceedings for the recovery of any debt due to the Company or to settle or adjust the same.

The affidavit of the defendant in answer to the application stated that the action was brought to recover 2*l.* 14*s.* 3*d.* for goods sold and delivered at the works of the Company situate at Keynsham, in Somersetshire; and that the defendant's place of business and residence were not more than seven miles from the Company's works, and, as well as the defendant's works, were within the jurisdiction of the County Court of Gloucestershire holden at Bristol.

The learned Judge at Chambers having referred the matter to the Court,

Oppenheim now moved for a rule calling on the defendant to shew cause why the Court should not direct that the plaintiffs shall recover their costs.—The question is whether the plaintiffs “dwell,” within the meaning of that word in the 9 & 10 Vict. c. 95, s. 128, at their registered office in London, or at Keynsham in Somersetshire, where the lime was manufactured and sold to the defendant. A railway Company “dwells” at the principal place where its business is carried on, and not at the stations where the passengers are booked: *Adams v. The Great Western Railway Com-*

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pany (a); Shiels v. The Great Northern Railway Company (b).
 [Pollock, C. B.—The case of a railway Company in sui generis. Here the plaintiffs do not carry on business at the office where the directors meet, but at the place where the goods are manufactured and sold.] There is this analogy between the two cases; a railway Company books passengers at the various stations on their line, and has a principal place of business; this Company manufactures and sells their goods at various places in the country and has a registered office in London. *Taylor v. The Crowland Gas and Coke Company (c)* decided that a joint stock Company completely registered under the 7 & 8 Vict. c. 110, “dwells” at the place where its business is carried on, but still the question remains, where does a Company in a case of this kind carry on its business? The 19 & 20 Vict. c. 47, s. 28, requires the Company to have a registered office to which all communications and notices may be addressed, and therefore that must be considered as the place where its business is carried on. Moreover, the Company is being wound up under “The Companies Act, 1862” (25 & 26 Vict. c. 89.) The 92nd section of that Act provides for the appointment of official liquidators; and by the 133rd section (5) upon the appointment of liquidators all the power of the directors shall cease; so that at the time the action was commenced the business was carried on by the official liquidator, who resided more than twenty miles from the defendant. [Channell, B.—The official liquidator is only substituted for the Company, and brings the action for them.]

Lumley Smith appeared to shew cause in the first instance; but was not called upon to argue.

POLLOCK, C. B.—I am of opinion that there ought to

(a) 6 H. & N. 404.

(b) 30 L. J., Q. B. 331.

(c) 11 Exch. 1.

be no rule. The authorities cited with reference to railway Companies are not applicable. There may be difficulty in applying the Act to those cases, and in all probability when it passed the legislature never contemplated the case of a railway Company having a multitude of stations, some of them more than a hundred miles distant from others; and the Courts have construed the Act in the best way they could under the circumstances. But in my judgment that furnishes no rule whatever for the plain case of a Company having a place of business where they manufacture an article and there sell and deliver it to persons residing in the neighbourhood, as this Company did. It is said that a person who has bought of them a few shillings worth of goods may be sued in the Courts of Westminster Hall because the Company have an office in London where the directors meet for the purpose of conducting the affairs of the Company. It seems to me that affords no ground whatever for holding that there is a concurrent jurisdiction, when the goods are manufactured and sold at Keynsham to a tradesman residing at Bristol.

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BRAMWELL, B.—I am of the same opinion. The question is, whether the plaintiffs “*dwell*” more than twenty miles from the defendant within the meaning of the 9 & 10 Vict. c. 95, s. 128. The plaintiffs are a corporation, and the case of *Taylor v. The Crowland Gas and Coke Company* (a) is an authority that a corporation dwells at the place where its business is carried on. Then the question arises, where did this corporation carry on its business? It is impossible to say that they carried it on elsewhere than where they made and sold the article for the price of which the action is brought, and that was at Keynsham. I think that the office in London was merely a place where the directors met for their own convenience, not the place where the

(a) 11 Exch. 1.

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business of the Company was carried on. Then it is said that the liquidator is the real plaintiff, and he lives and carries on his business in London; but he is only suing on behalf of the Company, who, at the time the debt was incurred and the action commenced, carried on their business at a distance of only seven miles from the defendant's residence and place of business.

CHANNELL, B.—I am clearly of the same opinion. I think that the decisions as to railway Companies are not applicable, for the reason given by the Lord Chief Baron. I agree with my brother *Bramwell*, that this Company carried on its business at the place where it manufactured and sold the goods, not at the place where the directors met for their own convenience. With regard to the point that these proceedings are conducted by an official liquidator appointed under "The Companies Act, 1862," that seems to me to make no difference. If the Company were not in the course of being wound up, and the proceedings had been carried on by the directors, the defendant would have had a right to say that he ought to have been sued in the County Court; and I am clearly of opinion that he is not deprived of that right because the Company are obliged to wind-up their affairs.

PIGOTT, B.—I am of the same opinion. In the case of *Shiels v. The Great Northern Railway Company* (a) Mr. Justice *Hill* points out that in a certain sense a railway Company carries on its business at every station in the kingdom where it makes contracts for the conveyance of passengers or goods, but not in the sense in which the expression "carry on his business" is used in the 9 & 10 Vict. c. 95. But this Company carried on their business, in every sense, at Keynsham, and not at their office in London.

Rule refused.

(a) 30 L. J., Q. B. 331.

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DICKINSON, Administratrix of DICKINSON, deceased, v. THE
NORTH EASTERN RAILWAY COMPANY.

Nov. 6.


THIS was an action brought under the statute 9 & 10 Vict. c. 93, by the plaintiff, as administratrix of Hannah Dickinson, deceased, on behalf of herself as the mother, and of William Dickinson as the child, of the said Hannah Dickinson.

A bastard is not a "child" within sect. 2 of the 9 & 10 Vict. c. 93, and can therefore maintain no action under that statute.

The defendants pleaded that the plaintiff was not the mother, and the said William Dickinson was not the child, of the said Hannah Dickinson, deceased, as alleged.

At the trial, before *Mellor*, J., at the Durham Summer Assizes, 1863, it appeared that William Dickinson had been entirely maintained and supported by his mother Hannah Dickinson, but that he was an illegitimate child. Hannah Dickinson was the legitimate daughter of the plaintiff. The learned Judge ruled that no damages could be recovered for the benefit of William Dickinson, and directed the jury to give damages for the plaintiff's benefit only.

Price now moved for a new trial, on the ground of misdirection.—"Child," in the 2nd section of the 9 & 10 Vict. c. 93, includes an illegitimate child. The legislature intended the right of action to be co-extensive with the moral right to support. The legal right to support cannot be the test of what class of persons can maintain this action. Under the Poor Laws a child, whether legitimate or illegitimate, has a legal right to support from his parent. But at common law he has no such legal right in either case. The 5th section of the 9 & 10 Vict. c. 93, which extends the ordinary meaning of the

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word "child" so as to include a stepchild, shews that the benefit of the enactment is not confined to blood relations. In *Dickenson v. Wright* (a), and in error *Clarke and Others*, representatives of *Dickenson*, deceased, v. *Wright* (b), the moral obligation of a mother to provide for her illegitimate children was considered in the judgment of both Courts to be as binding as if the children were legitimate. The point there decided was, that a limitation in a marriage settlement to an illegitimate child of the settlor was not void against subsequent purchasers under 27 Eliz. c. 4. For many purposes the law recognises the relationship of a bastard to his parent. Thus a marriage within the prohibited degrees of consanguinity or affinity is not the less null and void because one of the parties is illegitimate: *Haines v. Jeffel* (c); *Regina v. Brighton* (d). Illegitimate children have been held to take under a devise to "children": Jarman on Wills, 3rd ed., vol. 2, c. 31, p. 211, citing *Gill v. Shelley* (e). [*Bramwell*, B.—In that case the devise was to the children of a person who, before the will was made, had died, leaving only one legitimate child, and one illegitimate. *Pollock*, C. B.—In Hawkins on the Construction of Wills, c. 8, p. 80, the rule is thus stated:—"A gift to children means *legitimate* children only, unless it appears, from the context or from circumstances, that illegitimate children must have been intended." But beyond all doubt in the construction of this act of parliament the word "child" means legitimate child only.]—He also referred to *Follit v. Koetzow* (f).

Per CURLIAM (g).—The rule must be refused.

Rule refused.

(a) 5 H. & N. 401.

(b) 6 H. & N. 849.

(c) 1 Ld. Raym. 68.

(g) *Pollock*, C. B., *Bramwell*, B., *Channell*, B., and *Pigott*, B.

(d) 1 B. & S. 447.

(e) 2 Russ. & My. 336.

(f) 29 L. J., M. C. 128.

MICHAELMAS VACATION, 27 VICT.

EX PARTE BELK.

1863.

Dec. 7.

THIS was an application to the Court to allow the service of George Belk, under articles of clerkship to an attorney, to be reckoned to have commenced and be computed from the execution of the articles.

The affidavit of the applicant stated that previous to October, 1857, he had been engaged as clerk in the office of an attorney and solicitor for several years, and being about twenty-four years of age, and about to be married, was desirous of being articted, and explained to his father his position relative to pecuniary matters, and stated to him as the fact was, that deponent would have about 55*l.* towards the amount required for the payment of the stamp duty on his articles, whereupon his father promised that he would find him the rest of the money before the end of the ensuing six months, and advised him to get his articles completed at once.

In pursuance of such promise, and in full reliance that it would be kept, he immediately entered into a negotiation with John Smith, of Nottingham, to serve him as an articted clerk for five years, and articles of clerkship were accordingly drawn up, and signed by deponent and the said Smith, on the 4th November, 1857.

The applicant duly entered upon the service under the

The provisions of the 6 & 7 Vict. c. 73, ss. 8, 9, as to filing within six months an affidavit of the execution of articles of clerkship and enrolling them, are not merely for the purposes of the revenue, but also for securing the fitness of persons to be admitted as attorneys, and therefore, if the omission has been wilful, although the duty and penalty has been paid, the Court will not allow the service to be computed from the execution of the articles of clerkship.

Where a clerk served without having paid the stamp duty or enrolled his articles, partly in consequence of disappoint-

ment in receiving money which his father had promised him, and partly in consequence of an opinion of counsel, but after the expiration of the articles paid the duty and a penalty of 50*l.*, the Court refused to allow more than two years service under the articles.

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said articles, and shortly before the expiration of the first six months of the service he applied to his father for the sum of 25*l*., promised to him as aforesaid, and he then informed deponent that he was sorry that, in consequence of a loss which he had sustained upon contracts he had been engaged in, he was not able to let deponent have the money, and that the matter must stand over for a time, and he would advance it as soon as he could.

In consequence of the disappointment in the performance of his father's promise, deponent was unable to pay the stamp duty at the time required, and there appeared to be no other course to pursue than to serve as he had covenanted to do under the articles of clerkship, and to apply to the Lords Commissioners of the Treasury for leave to have his articles stamped as soon as he should be able to pay the duty and penalty, in pursuance of the statute 19 & 20 Vict. c. 81.

A short time after the expiration of the six months, in consequence of having some doubts whether it would not be advisable for him to enter into new articles of clerkship, deponent consulted a barrister on the Midland Circuit on the subject, and he advised the applicant that it was not necessary that he should enter into any new articles, but if he obtained authority to stamp the existing articles under the said statute, and paid the duty and statutory penalty, the articles would be valid and effectual.

In consequence of this advice, and his own firm belief that such would be the case, he continued to serve under the articles with the intention of applying to have them stamped under the said statute as soon as his father advanced the money, or deponent was in a condition to pay it from his own resources. He continued for a considerable time under the belief that his father would perform his promise, but finding that he did not advance the money

and that a larger sum had become necessary to cover the penalty as well as the duty, and being anxious to put an end to the unpleasantness which had arisen in consequence of his father not advancing the money, he ultimately, in the latter end of last year, was enabled to borrow, on a mortgage of a small freehold property belonging to him, but which he had not been able previously to make available for the purpose, a sufficient sum to enable him to pay the duty and penalty.

In November last, he presented a memorial to the Lords of the Treasury, and obtained leave to stamp the articles by payment of 80*l.* for the duty, and 50*l.* for the penalty, which duty and penalty have been paid, and the said articles duly stamped.

Deponent did not enter into the articles or refrain from stamping the same at the proper time with any fraudulent design or as a mere matter of speculation, but in perfect good faith, and with the full intention of paying, and a full expectation of being able to pay, the duty within the proper time; and the omission to stamp his articles at an earlier period was owing solely and entirely to the non-performance of his father's promise, (which was wholly unforeseen and unexpected by deponent), and his own inability to pay the duty and penalty until he was enabled to do so out of his own resources; and he had paid the duty and penalty in the full belief (acting on the advice which he had received) that it would give validity and effect to the service under the said articles.

Deponent had faithfully served the said J. Smith under the said articles of clerkship, and had not engaged in any other profession, trade, avocation or calling whatsoever during the said term, except that he was the Colour-Sergeant in a Company of Volunteer Rifles.

There was also an affidavit to the same effect by the

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father of the applicant ; and the attorney to whom he was articulated deposed to the service, and to his belief that the articles were not entered into by the applicant as a mere matter of speculation, but solely with a view to his being admitted as an attorney.

Hayes, Serjt., in support of the application (a).—By the 6 & 7 Vict. c. 73, s. 8, an affidavit of the execution of articles of clerkship shall be made and filed, within six months after the execution of the contract, with the officer appointed for that purpose, who shall thereupon enrol and register the contract. The 9th section provides, “that in case such affidavit be not filed within such six months the same may be filed by the said officer after the expiration thereof, but the service of such clerk shall be reckoned to commence and be computed from the day of filing such affidavit, unless one of the said Courts of law or equity shall otherwise order.” Under the 34 Geo. 3, c. 14, s. 2, if the articles of clerkship were not enrolled within six months after their execution the service only commenced from the time of the enrolment. That enactment was imperative, and the Court had no power to order an enrolment nunc pro tunc: *Ex parte Pilgrim* (b). The 7 Geo. 4, c. 44, s. 1, provided an indemnity for persons who had paid the stamp duties within six months after the execution of the articles of clerkship, but had omitted to file an affidavit of their execution, or to enrol them. But section 4 prohibited the Commissioners of Stamps from stamping any articles of clerkship after the expiration of six months from their date. The 7 & 8 Vict. c. 86, which was also an Act of indemnity, by section 3 repealed the provisions of the 34 Geo. 3, c. 14, s. 2, as to enrolment of articles of clerkship. By section 2, if articles

(a) Nov. 13. Before *Pollock*, and *Pigott*, B.
 C. B., *Bramwell*, B., *Channell*, B., (b) 1 B. & C. 264.

of clerkship have not been enrolled within the time allowed, the Court may order that the service shall be reckoned to commence and be computed from the execution of the contract, or from any subsequent period prior to such enrolment. The 19 & 20 Vict. c. 81, s. 3, enabled the Commissioners of Inland Revenue, notwithstanding the 7 Geo. 4, c. 44, s. 4, in case they were directed so to do by the Commissioners of the Treasury, to stamp articles of clerkship upon payment of the duty and a penalty according to a graduated scale, which is 50*l*. when the articles are brought to be stamped after four years from their date. Therefore, as regards the stamp duty, this is purely a fiscal question, and a discretion having been vested in the Lords of the Treasury, they have exercised it and ordered the articles to be stamped on payment of the duty and penalty. Unless this application be granted, the applicant will have paid the penalty without obtaining any benefit. [*Bramwell*, B.—I do not see why the Lords of the Treasury should not sanction the payment for the purposes of the revenue, and the Court exercise their discretion in refusing the application where there has been a wilful omission to stamp within the proper time. *Channell*, B.—I protest against the argument that, because the duty and penalty have been paid, the Court has no discretion in the matter.] Payment of the penalty gave a retrospective validity to the articles of clerkship. The omission to stamp was not wilful, but arose from unforeseen circumstances. The authorities are in favour of the applicant. In *Ex parte Norton* (a), where the articles of clerkship had not been stamped within six months from their execution, but were subsequently stamped under the 19 & 20 Vict. c. 81, s. 3, and enrolled, the Court allowed the service under them to be computed from the date of their execution. In *Ex parte Bishop* (b), the same course was

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(a) 26 L. J., Q. B. 24.

(b) 9 C. B., N. S. 150.

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adopted, upon the Court being satisfied that the nonpayment of the duty at the proper time arose from unforeseen emergency, and not from intentional neglect or design. The principle of that decision was recognised and adopted in *Ex parte Herbert* (a), where *Cockburn*, C. J., and *Wightman*, J., considered that as the Lords of the Treasury, who are guardians of the revenue, had thought fit to allow the articles to be stamped, the Court ought not to interfere with their discretion. In *Ex parte Breden* (b), the Court of Queen's Bench refused to allow the service under the articles to be computed from the date of their execution, but a similar application having been made to the Court of Common Pleas, on affidavits stating additional facts, that Court, after conferring with the Court of Queen's Bench, granted the application: *In re Breden* (c). This case is not distinguishable. In *Ex parte Edwards* (d) the application was refused, because the Court were of opinion that the clerk at the time he articulated himself had not any reasonable expectation that the money would be forthcoming. At all events, the Court may allow a portion of the service under the articles: *Ex parte Broster* (e); *Chit. Arch. Prac.*, vol. 1, p. 35.

Cur. adv. vult.

The judgment of the Court was now delivered by

POLLOCK, C. B.—In this case, after consulting with the Judges of the Queen's Bench, we think the application may be granted; the service under the articles to be reckoned to have commenced and be computed from the expiration of three years from their date. The applicant, therefore, will have the benefit of the stamp on the articles, and of two years of the service already had under them.

(a) 1 B. & S. 825.

(b) 2 B. & S. 649.

(c) 12 C. B., N. S. 351.

(d) 32 L. J., C. P. 213.

(e) Bail Court, cor. *Coleridge*, J., 25th April, 1850.

Our opinion is that the provisions for the filing of the affidavit and the enrolment and registration of the contract in 6 & 7 Vict. c. 73, ss. 8 & 9, are not merely for the purposes of the revenue, but also for assisting in securing the due fitness of the persons who are to be admitted as attornies. It seems to us, therefore, that it is not enough that the Treasury is satisfied, but that we ought to take care that the other objects of the statute are not frustrated; and, consequently, if it appeared that the omission to stamp the articles, and so to enrol and register them and the affidavit, was wilful on the part of the clerk, whether to save the stamp, or for any other reason, we should not interfere to assist him. In other words, we think we must consider the question as we should if the articles had been properly stamped at first, but the affidavit not made, and the articles not enrolled or registered by the clerk's desire; except, of course, that as the cause of such non-enrolment and registration must be regarded, we must look at the want of stamp in this case as the cause. The continued service under the unstamped articles was with notice and was wilful; but there is an affidavit that the omission to stamp, enrol and register was not wilful, and was the result of what has been called an "emergency," and partly in consequence of an opinion given by a learned counsel. We, therefore, think some relief may be given; but the explanation is to such an extent unsatisfactory, and it is so desirable to prevent the recurrence of such proceedings, that we think it right that only two years of service shall count, and that the service under the articles of clerkship be reckoned to have commenced and be computed from the expiration of three years from their date (a).

Rule accordingly.

(a) See *Ex parte Wilson*, 33 L. J., Q. B. 89.

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Dec. 7.

HUGHES v. MACFIE and Others.

ABBOTT v. MACFIE and Others.

The defendants were the occupiers of a warehouse on one side of a street into which their cellar opened. The public had a right of way over the whole street subject to the existence of the cellar, but the only flagged footpath was on the other side. The defendants took off the lid which covered their cellar and left it nearly upright against their wall. A child jumped from the lid and pulled it over, injuring himself and another child. *Held*:—That the defendants were not liable at the suit of the first child, who had voluntarily meddled for no lawful purpose with that which, if left alone, would not have hurt him; but that they were liable at the suit of the second child, if not a joint actor with the first.

THESE two actions were tried together before the Assessor of the Court of Passage of the borough of Liverpool.

The pleadings in both actions were the same, and the plaintiff in each action being an infant sued by his next friend.

The second count of the declaration (which was the count relied on) stated that the defendants by their servants, on the 1st of June, A.D. 1863, so wrongfully, negligently and improperly put, placed, and managed a certain cellar lid in a certain public highway along which the plaintiff was then lawfully passing, that the said cellar lid fell upon and struck against the plaintiff, whereby he was thrown down and permanently injured &c.

Pleas.—First: Not guilty.

Third.—That the alleged injuries were caused by the negligence and improper conduct of the plaintiff, and not otherwise.

At the trial the case opened by the plaintiff's counsel and partly proved was as follows:—The defendants carried on the business of sugar refiners, and their warehouse formed for some distance the side of a public street in Liverpool. The cellar of the warehouse extended under the street, and opened into it, and through the opening the defendants' sugar casks were let up and down by the defendants' work-


men in the regular course of business. The opening, when not required for this purpose, was covered by a large wooden flap or lid, with three cross bars on its lower face, fitting into stone grooves which formed its support. On the side of the street where the warehouse was there was no flagged footpath, but the gutter ran along at a distance of six feet from the warehouse, and the road shelved down from the warehouse to the gutter. The flagged footpath in ordinary use was on the opposite side of the street. On the day of the accident the defendants' workmen had removed the flap for the purpose of lowering sugar casks into the cellar, and having reared it against the wall, nearly upright, with its lower face (on which were the cross bars) towards the street, had gone away. The plaintiff, a child seven years old, was playing in the street with other children, when one of them, a child of five years old (the plaintiff in the other action), got upon the cross bars of the flap, and in jumping down caught some part of the flap with his jacket and pulled it over upon himself and the plaintiff.

The learned Assessor being of opinion that the above facts, if proved, would not render the defendants liable, directed a nonsuit to be entered in both actions.

R. G. Williams, in last Michaelmas Term, obtained a rule nisi in each action to set aside the nonsuit, and for a new trial, upon the ground that there was evidence to go to the jury that the defendants were responsible for the injury occasioned to the plaintiff.

L. Temple and Littler shewed cause (Nov. 24) (a).—First, there was no evidence of negligence on the part of the defendants. And, secondly, even if the defendants' negligence be assumed, the action is not maintainable. The

(a) Coram Pollock, C.B., Bramwell, B., Channell, B., and Pigott, B.

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plaintiff Hughes, by his wrongful act, contributed to his own damage; or rather he was the immediate cause of it. *Lynch v. Nurdin* (a), if still a binding authority, is on that ground distinguishable. But in subsequent cases *Lynch v. Nurdin* has been commented on with disapproval, if not expressly overruled. Thus, in *Lygo v. Newbold* (b), Alderson, B., says, "The negligence, in truth, is attributable to the parent who permits the child to be at large. It seems strange that a person who rides in his carriage without a servant, if a child receives an injury by getting up behind for the purpose of having a ride, should be liable for the injury." In *Singleton v. The Eastern Counties Railway Company* (c) it was held that an infant three years old having strayed on the Company's railway could maintain no action for an injury caused by a passing train, although there was a rail off the fence through which it was supposed that the child had got upon the railway. In *Barnes v. Ward* (d) and other cases, where it has been held that an action would lie at the suit of a person who has sustained an injury by falling in the night time into a hole abutting on a public highway, the ground of the decision has been that there could in such cases be no available notice of the danger. As regards the plaintiff Abbott, inasmuch as he was playing with Hughes when the accident occurred he was a party to the act which caused the damage.

McCulloch and *R. G. Williams*, in support of the rule (e).—
 First, there was clear evidence of the defendants' negligence.

(a) 1 Q. B. 29.

(b) 9 Exch. 302.

(c) 7 C. B., N. S. 287.

(d) 9 C. B. 392.

(e) In answer to a question
 from the Court the plaintiff's

counsel admitted that for the purposes of the rule the way might be assumed to have been dedicated to the public, subject to the existence of the defendants' cellar.

Primâ facie the right of passage enjoyed by the public extends over the whole space between the fences or walls which form the boundaries of the road: *The Queen v. The United Kingdom Electric Telegraph Company* (a). This right of passage was obstructed by the cellar flap of the defendants. The removal of the flap from the cellar mouth and the placing it in the road, if lawful at all, could only be so during the actual process of lowering the sugar into the cellars: *Rex v. Jones* (b). A duty was imposed on the defendants to place the flap in such a position as to avoid danger to the public. Either it should have been fastened to the wall by a hook or other similar contrivance, or it should have been laid flat upon the ground.—But, secondly, assuming the defendants' negligence, the question arises whether either of the plaintiffs has, by his own contributory negligence, disentitled himself to recover. As regards the plaintiff Hughes, it is submitted that *Lynch v. Nurdin* (c) is express that in the case of an infant plaintiff of tender years the circumstance that he was a trespasser, and contributed to the mischief by his own act, will not necessarily preclude the maintenance of the action. And in its circumstances that case closely resembles the present. Here, as there, it was by the defendants' negligence that the plaintiff was induced to do the wrongful act which contributed to his damage, and being a young child he might reasonably be expected to act without any great amount of care or prudence. The authority of *Lynch v. Nurdin* (c) stands unimpeached by later decisions. The case suggested by *Alderson, B.*, in *Lygo v. Newbold* (d), of a child sustaining an injury by getting up behind a carriage is obviously inapplicable,

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(a) 31 L. J., M. C. 166.
 (c) 1 Q. B. 29.

(b) 3 Camp. 230.
 (d) 9 Exch. 305.

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since it involves no negligence in the owner of the carriage, and *Pollock, C. B.*, expressly distinguished *Lynch v. Nurdin* from the case then under discussion. So again in *Singleton v. The Eastern Counties Railway* (a) the judgments of the Court proceeded upon the distinct ground that there was a surmise merely, but no evidence, of the defendants' negligence. As regards the plaintiff Abbott the authority of *Illidge v. Goodwin* (b) and *Dixon v. Bell* (c) is decisive. And per Lord Denman in delivering the judgment of the Court, in *Lynch v. Nurdin* (d), "If I am guilty of negligence in leaving anything dangerous in a place where I know it to be extremely probable that some other person will unjustifiably set it in motion to the injury of a third, and if that injury should be so brought about, I presume that the sufferer might have redress by action against both or either of the two, but unquestionably against the first." They also referred to *Fisher v. Prowse* (e).

Cur. adv. vult.

The judgment of the Court was now delivered by

POLLOCK, C. B.—The two cases of *Hughes v. Macfie* and *Abbott v. Macfie* were tried in the Passage Court at Liverpool before the Assessor, who in each case nonsuited the plaintiff. The facts may be shortly stated thus:—

It appeared there was a public street in Liverpool, over the whole of which, from fence to fence, the public had a right of way subject to the existence of certain cellars. On one side of the street was a footpath; on the other side no footpath, but the cellars alluded to, which made that side less commodious as a way. Still, the public had the right to

(a) 7 C. B., N. S. 287.

(c) 5 M. & Sel. 198.

(b) 5 C. & P. 190.

(d) 1 Q. B. 35.

(e) 2 B. & S. 770.

pass there. The defendant, who was the occupier of a house and cellar on this latter side, took off the flap or cover of his cellar and placed it against the wall on the same side, nearly upright, so that it could easily be pulled over. It may be admitted that if a person, in passing along the street, had, without carelessness (as, for example, by his dress being blown against it), pulled the flap over, and been hurt thereby, he might have maintained an action against the defendants for the negligence or wrong in placing the flap so that, without any negligence in the plaintiff, it was likely to do, and had done, damage to him.

In the case in which Hughes was the plaintiff, the flap was pulled over by the plaintiff, a child of tender years, by playing on it and jumping from it, when it fell upon him, and hurt him severely. Had he been an adult, it is clear he could have maintained no action. He would voluntarily have meddled for no lawful purpose with that which, if left alone, would not have hurt him. He would therefore, at all events, have contributed by his own negligence to his damage. We think the fact of the plaintiff being of tender years makes no difference. His touching the flap was for no lawful purpose, and if he could maintain the action, he could equally do so if the flap had been placed inside the defendants' premises within sight and reach of the child. As far as the child's act is concerned, he had no more right to touch this flap for the purpose for which he did touch it, than he would have had if it had been inside the defendants' premises. Cases were referred to, supposed to be in favour of the plaintiff. We think none are decisive of this case, and no case establishes a principle opposed to our view, which is, that the nonsuit was right.

As to the other action, in which Abbott was plaintiff, the case is different. If he was playing with Hughes, so as to be a joint actor with him, he cannot maintain this action.

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If not, we think he can, as his injuries would then be the result of the joint negligence of Hughes and the defendants. How this is does not appear; and we think as to his case there ought to be a new trial (a).

Rule accordingly.

(a) The case of *Abbott v. Macfie* was in accordance with the above judgment. The jury found a question submitted to the jury verdict for the defendants.

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ROUTH and Others v. MACMILLAN and Others.

The defendants, ship-owners at Liverpool, by power of attorney appointed G. P. their agent, inter alia, to charter their ship "Hannah Eastee," or employ her as a general ship, on such terms or in such manner as he

THE declaration stated that in parts beyond the seas, to wit, at New York in America, a charter-party was made and entered into by and between the plaintiffs, therein described by and under the name, style and firm of Messrs. H. L. Routh and Sons, merchants, of New York, and the defendants, by one Gilbert Periam, their agent in that behalf, and therein described as agent for the owners of the ship therein mentioned. (The declaration then set out the charter-party, the material parts of which are stated *post*, should think proper, and generally to represent them in relation to the premises, and to the said brig, her management or sale, as fully as if they were personally present. The "Hannah Eastee" had been an A 1. ship at Lloyds, but had run off her letter before the power was executed and was not described as A 1. in the power. The plaintiffs, British subjects and merchants at New York, having an order from England for a cargo of wheat, chartered the "Hannah Eastee" to carry it from New York to Gloucester. The charter-party, which was not under seal, purported to be made between the plaintiffs and G. P. agent for owners of the A 1. Br. brig "Hannah Eastee" of Liverpool. The consignee of the cargo, on learning that the ship was not A 1. at Lloyds, refused to accept. Ultimately he agreed to accept, upon the plaintiffs' agent in England undertaking to pay the extra expense of insurance in consequence of the ship not being A 1. The cargo arrived safe. In an action for breach of warranty of the ship's class the plaintiffs sought to recover the extra expense of insurance which they had repaid their agent.

*Held*:—First, that the description in the charter-party was a warranty that the "Hannah Eastee" was at the date of the charter-party an A 1. ship at Lloyds in England.

Secondly, that the power of attorney authorized the warranty.

Thirdly, that the damage which the plaintiffs had sustained was *legal* damage.

p. 752.) **Averments.**—That the plaintiffs loaded the said cargo of wheat in bulk, at New York aforesaid, to be carried from New York aforesaid to Gloucester aforesaid, according to the said charter-party, and under and by virtue of it; and they did and performed all things and all things happened and existed to entitle them to a performance by the defendants of the said charter-party in respect of the matters hereinafter alleged not to have been performed by them; and the said terms and words in the said charter-party, that is to say, the said words “of the A 1. Br. brig ‘Hannah Eastee’ of Liverpool,” were by the plaintiffs and defendants, at the time of the making of the said charter-party, intended to mean, and did mean (among other things), that the said brig therein described was of the class called and known as A 1. at Lloyds, and the defendants by the said charter-party warranted that the said vessel was of that class. **Breach.**—That the defendants broke the said charter-party and the said warranty in this, to wit, that the said vessel at the time of the making of the said charter-party, or at any time since, was not of the said class. And the plaintiffs say that by reason of the premises, and of the said vessel not being of that class, they could not procure persons to insure the said cargo against damage or loss whilst on board the said vessel during the said voyage without paying extra premiums and monies for the insurance of the same. And the plaintiffs, in order to procure such insurance, were forced and obliged to pay, and did pay divers large sums of money for premiums of insurance to divers persons for insuring the said cargo on board the said vessel from damage or loss during the said voyage, and over and beyond the monies and premiums which they otherwise would have had to pay for such insurance had the said vessel been of the class aforesaid. And the defendants, at the time of the making of the said charter-party, had

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notice and knowledge that the plaintiffs would insure the said cargo on board the said vessel against damage and loss during the said voyage, and the plaintiffs were and are by means of the premises otherwise damaged (a).

Pleas.—First, a denial that the defendants made or entered into the said charter-party as alleged.

Second.—A denial that the said words in that behalf mentioned were intended to mean or did mean as alleged.

Third.—A denial of the warranty alleged.

Issues thereon.

At the trial, before *Byles*, J., at the Bristol Spring Assizes, 1863, the following facts appeared:—The plaintiffs were British subjects, carrying on business as merchants at New York, and the defendants shipowners at Liverpool. In December, 1861, the plaintiffs received an order, through Hellicar, their agent at Bristol, for 1000 quarters of wheat for the firm of J. and H. Adams, who carried on the business of corn merchants at Gloucester and Bristol. Accordingly, on the 6th of January, 1862, the plaintiffs chartered the “*Hannah Eastee*,” from New York to Gloucester.—The charter-party (so far as material to the present question) was as follows:—

“ This charter-party made and concluded upon in the city of New York this 6th day of January, in the year 1862, between Gilbert Periam, agent for owners of the *A 1. Br. brig ‘Hannah Eastee,’ of Liverpool*, of the burthen of 212 tons, or thereabouts, now lying in the harbour of New York, of the first part, and Messrs. H. L. Routh and Sons, merchants, of New York, of the second part; Witnesseth that the said party of the first part, for and in consideration of the covenants and agreements hereinafter

(a) There was a second count for fraudulently representing that the “*Hannah Eastee*” was classed

A 1. at Lloyds, but no evidence was offered at the trial in support of this count.

mentioned to be kept and performed by the said party of the second part, doth covenant and agree on the freight-  
ing and chartering of the said vessel unto the said party of  
the second part, for a voyage from the port of New York to  
Gloucester (England), or so near thereto as she can safely  
get, on the terms following, that is to say :—

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“ First.—The said party of the first part doth engage that  
the said vessel in and during the said voyage shall be kept  
tight, staunch, well-fitted, tackled and provided with every  
requisite, and with men and provisions necessary for such a  
voyage.

“ Second.—The said party of the first part doth further  
engage that the whole of the said vessel (with the exception  
of the cabin, the deck and the necessary room for the  
accommodation of the crew and of the sails, cables and  
provisions) shall be at the sole use and disposal of the said  
party of the second part during the voyage aforesaid.

“ Third.—The said party of the first part doth further en-  
gage to take and receive on board the said vessel, during the  
aforesaid voyage, all such lawful goods and merchandize as  
the said party of the second part or his agent may think  
proper to ship, and to sign bills of lading without prejudice  
to this charter-party.

“ And the said party of the second part, for and in con-  
sideration of the covenants and agreements to be kept and  
performed by the said party of the first part, doth covenant  
and agree with the said party of the first part to charter and  
hire the said vessel as aforesaid on the terms following,  
that is to say :—

“ First.—The said party of the second part doth engage to  
provide and furnish to the said vessel a full and complete  
cargo of wheat in bulk.

“ Second.—The said party of the second part doth further  
engage to pay to the said party of the first part, or his agent,

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for the charter or freight of the said vessel during the voyage aforesaid, in manner following, that is to say; eleven pence sterling for each and every bushel of 60 lbs. delivered, with five per cent. primage, payable in cash on delivery without credit, discount or commission.

. [Other clauses followed regulating the lay days, demurrage, &c., but not here material.]

“ In witness whereof, &c.

“ Signed and delivered in the presence of, &c.

“ G. Periam,

“ H. L. Routh and Sons, Agents.”

The charter-party was not under seal.

Gilbert Periam, who on behalf of the defendants signed the charter-party, was acting for them at New York, under a power of attorney, dated the 20th of September, 1861, by which the defendants (therein described as registered owners of 64 sixty-fourth shares of the *British brig* “*Hannah Eastee*” of Liverpool), had appointed him their lawful attorney to take possession of the brig “*Hannah Eastee*,” and discharge her master, and all or any of her officers and crew, and from time to time to appoint others at such wages and on such terms in all respects as he should think proper, and upon their discharge to settle accounts and claims for wages, &c. And to sue for, receive and give receipts for freight or other monies payable, or which might become payable in respect of the said brig, or any goods or passengers conveyed or to be conveyed by her, or in respect of any insurance or general average or otherwise. “*And also from time to time to charter the said brig or to employ the said brig as a general vessel on any voyage or voyages on such terms and in such manner in all respects as their said attorney should think proper.*” And also to sell, transfer or exchange all or any of the plaintiffs’ shares in the said brig, and to sell the freight, &c., on any voyage on which she might be

then or at any time engaged, in such manner and on such terms as their said attorney should think proper, and to execute all instruments necessary to effectuate such sale, transfer or exchange, &c., and to prosecute and compromise actions, &c. *“ And generally to act for and represent them and each of them in all respects in relation to the premises, and generally in relation to the said brig, her management, or sale, as fully in all respects as if they were personally present, and to do all acts, matters and things requisite for that purpose, although the same be not specially mentioned.”*

The charter being effected, the plaintiffs wrote to advise the Messrs. Adams, at the same time transmitting the charter-party. The Messrs. Adams, on inquiry at Lloyds, ascertained from Lloyds lists, which are corrected weekly, that the “Hannah Eastee” was not at the date of the charter-party an A 1. vessel, nor had she then any classification. It appeared, however, that in 1859 she had obtained her certificate as an A 1. vessel for eight years, subject to annual survey, but in the spring or summer of 1861, she had met with an accident, and had run off her letter. Lloyds Register, which circulates abroad, is published annually in June, but whether or not the “Hannah Eastee” was classed in the Register of 1861 as an A 1. vessel did not distinctly appear. The Messrs. Adams, on ascertaining that the “Hannah Eastee” had no classification at Lloyds, gave notice to Hellicar that they should reject the cargo. An arrangement was then effected between the Messrs. Adams and Hellicar, by which Hellicar undertook to get the wheat insured, and the Messrs. Adams to pay so much of the insurance as would at the current rates have insured the wheat if it had been on board an A 1. vessel. Hellicar accordingly employed an insurance broker, who effected the insurances between the 1st of February and the 24th of

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March. The rates at which they were effected were the lowest then current for vessels without classification at Lloyds. The difference between the insurances thus effected and insurances at the rates current for A 1. vessels amounted to 262*l.* 14*s.*; which sum, having been repaid to Hellicar by the plaintiffs, formed the subject of the present claim.

The "Hannah Eastee" sailed from New York on the 7th of March, 1862, and arrived at Gloucester subsequently to the 24th of March, with her cargo uninjured. The Messrs. Adams thereupon paid the freight. The bill of lading, which had been forwarded previously, bore date the 31st of January, 1862, and was made out to shippers' orders and indorsed generally by the plaintiffs, but the date when it was received by the Messrs. Adams did not appear.

On the part of the defendants it was objected; first, that there was no warranty that the "Hannah Eastee" was an A 1. vessel at Lloyds; secondly, that there was no evidence that the parties knew the term A 1. meant A 1. at Lloyds in England, or that in America it was so understood; thirdly, that assuming the words in the charter-party to amount to a warranty, the agent Periam had no authority to warrant; fourthly, that the plaintiffs were merely agents of Adams, and had no insurable interest in the cargo, and had therefore no right to sue; fifthly, that assuming the right of action to exist, the plaintiffs had sustained no legal damage.

Under the direction of the learned Judge, a verdict was entered for the plaintiffs with 262*l.* 14*s.* damages, leave being reserved to the defendants to move to enter the verdict for them, or to reduce the damages as the Court might direct.

*Montague Smith*, in last Easter Term, obtained a rule nisi to enter the verdict for the defendants, on the ground that there was no warranty that the ship was A 1. at Lloyds as alleged, and that the agent Periam had no authority to

warrant the ship as A 1. at Lloyds; or to reduce the damages, on the ground that the plaintiffs were not entitled to recover the difference on premiums.

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*Karslake* and *H. T. Cole* shewed cause (a).—First, the agent had authority to warrant the vessel's class. The power of attorney, which empowers him to charter the vessel, "on such terms and in such manner" as he shall think proper, is worded throughout in the most ample terms. The concluding sentence shews a clear intention on the part of the owners to delegate to their agent all powers over the vessel which they could themselves exercise. In *Willis v. Palmer* (b), where the language of the power of attorney was similar, *Erle*, C. J., in dealing with the question of authority, laid stress on the comprehensive words of the power.

Secondly, the words "A 1. Br. brig" are words of warranty, and not of mere description. In *Ollive v. Booker* (c), the opinion was expressed by *Parke*, B., and *Alderson*, B., that the description of a ship as A 1. in a charter-party is a warranty of her class. So in *Hurst v. Usborne* (d) *Crowder*, J., was of opinion that such a description is a warranty of the vessel's classification *at the time of the contract*, though he concurred in the decision that there was no warranty in that case that the vessel should retain her class. The general rule as to the effect of descriptive statements in a contract is thus laid down by *Williams*, J., in delivering the judgment of the Court of Exchequer Chamber, in *Behn v. Burness* (e):—"With respect to statements in a contract descriptive of the subject-matter

(a) Nov. 3 & 4. Before *Pollock*,  
C. B., *Bramwell*, B., *Channell*, B.,  
and *Pigott*, B.

(b) 7 C. B., N. S. 340.

(c) 1 Exch. 424.

(d) 18 C. B. 154.

(e) 3 B. & S. 751.

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of it, or of some material incident thereof, the true doctrine established by principle as well as authority appears to be that, if such descriptive statement was intended to be a substantive part of the contract, it is to be regarded as a warranty." And in a later part of the judgment it is said, "That the Court must be influenced in the construction of the charter-party, not only by the language of the instrument, but also by the circumstances under which, and the purposes for which the charter-party was entered into." The purpose here was the carriage of a cargo of wheat in bulk, for which a vessel of a superior class is required. And the description of the vessel's class necessarily raises important considerations in the mind of the merchant. The profitable character of his adventure may depend upon the truth or falsehood of such description. The circumstance that higher premiums are charged for vessels without classification at Lloyds than for A 1. vessels is, among shipowners and merchants, matter of common knowledge. The plaintiffs had in this case no opportunity in America of ascertaining the truth or falsehood of the description at the date of the charter-party.

Thirdly, the language of the contract must be construed by the law of England. The plaintiffs and defendants are British subjects, and by the terms of the contract it was to be consummated in this country.

Fourthly, the damages which the plaintiffs have sustained result directly from the breach of warranty, and are legally recoverable. The plaintiffs had an insurable interest in the cargo. The property in the wheat had not passed to Adams at the date of the insurances. The bill of lading was made out to shippers' orders, and the indorsement was general. The ordinary practice being to insure, if Adams had persevered in his refusal to accept the cargo, Hellicar as a prudent agent would necessarily have insured. The defendants have received the full freight for an A 1. vessel.

*Montague Smith* and *H. Bullar*, in support of the rule.—  
 First, the defendants' agent had no authority to warrant the vessel's class. Assuming the words in the charter-party to amount to a warranty, it was a clear excess of authority on the agent's part to depart from the description of the vessel in the deed creating his powers. The powers in the deed are special. A discretion was no doubt vested in the agent in arranging the terms of the charter, but this could not extend to a warranty of the vessel's classification. An agent appointed to sell has no implied authority to warrant: *Brady v. Todd* (a). A fortiori an agent to charter or let has no such authority. The word "charter" in the power of attorney is used in its ordinary signification of "letting a vessel for hire." Fraud is not suggested. But in the absence of fraud the defendants could not have intended to give the alleged warranty, since the vessel had run off her letter before the power of attorney was executed. The authority of an agent employed specially in a single transaction must be pursued strictly, and it is the duty of the party dealing with him to ascertain the extent of his authority: *Smith's Mercantile Law*, 6th ed., p. 135; *Attwood v. Munings* (b).

Secondly, the words A 1. in the charty-party are words of mere description. It is a document inter partes, and made in consideration of the covenants and agreements thereafter mentioned, which shews that A 1. and all before the witnessing part is mere description. The only warranty is contained in the covenant by the party of the first part that the vessel shall be staunch, &c., and provided with every requisite for the voyage. Then there is a corresponding covenant by the party of the second part. There is no decision which conflicts with this view. In *Budd v. Fairmaner* (c) *Tindal*, C. J., points out the different obligation

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(a) 9 C. B. N. S. 592.

(b) 7 B. & C. 278.

(c) 8 Bing. 52.

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arising from a warranty and mere description. The adverse expressions of opinion in *Ollive v. Booker* (a) and *Hurst v. Usborne* (b) were extrajudicial, and had no direct bearing on the point decided. *Ollive v. Booker* was not an action for a breach of warranty, but for not loading the vessel in pursuance of the terms of the charter-party. The case of *Barker v. Windle* (c), where it was held that the statement of a ship's tonnage in a charter-party was matter of description, and did not amount to a warranty, is more analogous to the present case, and supports the contention that a mere introductory statement is no warranty.

Thirdly, the contract should be construed according to the law of the country where it was made. This contract was not only made, but was to be consummated, at New York. There was no evidence that "A 1." has the same meaning at New York that it has in London, and the vessel might have answered its description at New York. [*Pollock*, C. B.—Until the contrary is shewn, we must assume that A 1. has the same meaning in New York as in London.]

Fourthly, there was no legal damage to the plaintiffs, even if there was a warranty. They were not the owners of the cargo, and had no insurable interest. [*Pigott*, B.—They had to pay a higher premium in consequence of the vessel not being of the class described.] It would have been the same if the vessel had answered her description on the day the contract was entered into and had gone off Lloyds list the following day. *Hurst v. Usborne* (b) is an authority that, if a vessel answers the description at the time of the contract, there is an end of the warranty. Messrs. Adams had no right to reject the cargo in the first instance; and there was no proof that the defendants had

(a) 1 Exch. 416.

(b) 18 C. B. 144.

(c) 6 E. & B. 675.

notice that the plaintiffs were about to effect an insurance.  
 [Channell, B.—Messrs. Adams rejected the cargo because it was in a ship not of the class A 1. The declaration exactly describes the damage which the plaintiffs sustained by reason of the ship not being A 1., if it is legal damage.]

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*Cur. adv. vult.*

The judgment of the Court was now delivered by

POLLOCK, C. B.—In *Routh v. Macmillan*, we are of opinion that the rule must be discharged.

There were two questions not disposed of by the Court.

The action was on a charter-party made in New York between two British subjects. It was made by an agent on behalf of the defendant. It commenced by stating that it was made between the charterer and the agent of the defendants, “owners of the British ship A 1.” The first question is whether this was a warranty or undertaking by the owner, that the vessel was classed A 1. at Lloyds at the date of the making of the charter. We think this is concluded by the authorities, and we think also that the charter-party is to be construed as if it was executed by the owner in person. It is decided by authority that such a statement is an undertaking or warranty, and this decision can be effectually questioned only in a Court of error, if at all.

The other question is whether the agent had authority to enter into a charter-party with such an undertaking, as to which we may say that he had, if the words can give it; for it is impossible that words could have been used more comprehensive than those in the power of attorney under which the agent acted.

The rule therefore must be discharged.

Rule discharged.

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## ROBERTSON v. POWELL and Others.

In interpreting a will and codicil the general rule is, that the whole will takes effect except so far as it is inconsistent with the codicil.

If a devise in a will is clear, it is incumbent on the party who contends that it is not to take effect by reason of a revocation in the codicil, to shew an intention to revoke equally clear with the original intention to devise.

A testator by his will dated the 22nd October, 1802, charged an estate with certain annuities (including one to the plaintiff), and

subject thereto devised the estate to his second son B. for life, with remainder to the children of B. in tail, remainder to G. the testator's eldest son for life, remainder to G.'s children in tail, remainder to the plaintiff for life, remainder to T. in fee. G. died in 1806 without issue. T. died in 1818. In 1819 the testator executed an instrument therein declared to be a codicil *to be added to and taken as part of his will dated on or about the 23rd October, 1802*, and thereby gave an *additional* annuity to the plaintiff, and, after giving certain other annuities and legacies, gave to B. *all his estates and property of every description whatsoever after discharging the above legacies*. The testator died in 1820. B. died without issue in 1861, and the defendants were his devisees.—*Held*, that the instrument of 1819 operated as a codicil to the will of 1802, and not as an original will, and that the life estate given to the plaintiff by the will was not revoked by the gift to B. in the codicil.

**EJECTMENT** to recover certain premises, situate at Hogeston, in the county of Pembroke.—The defendants defended as landlords.

At the trial, before *Channell*, B., at the Pembrokeshire Summer Assizes, 1862, a verdict was entered under the direction of the learned Judge for the plaintiffs, as to thirteen sixteenths of the property in question, and for the defendants as to the remaining three sixteenths; leave being reserved to the defendants to move on the construction of the will and codicil of one Robert Robertson (from whom both plaintiff and defendants claimed to deduce title), to enter a nonsuit or a verdict for the defendants for the whole.—The facts and arguments are stated at length in the judgment of the Court.

*H. Giffard*, in Michaelmas Term, 1862, obtained a rule nisi accordingly upon the ground that the codicil operated as a revocation of the life estate given in the will to the plaintiff.

*Mellish*, *H. Allen* and *Owen* shewed cause (January 29th, 1863) (a): citing *Doe dem. Hearle v. Hicks* (b), *Murch v.*

(a) *Coram Pollock*, C.B., *Channell*, B., and *Wilde*, B. *Martin*, B., was present only during a por-

tion of the argument.

(b) 1 Cl. & F. 20; S. C. 8 Bing. 475.

*Marchant (a)*, *In re Arrowsmith's Trusts (b)*, *Cleobury v. Beckett (c)*, *Freeman v. Freeman (d)*, *Williams v. Evans (e)*, *Molyneux v. Rowe (f)*, *Plenty v. West (g)*, *Doe d. Evers v. Ward (h)*, *Scale v. Barter (i)*, Jarman on Wills, 3rd ed., vol. 1, p. 444, 454, *Doe d. Snape v. Neville (k)*.

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*Dart* and *C. E. Coleridge (H. Giffard* with them), in support of the rule, commented on and distinguished the cases cited on behalf of the plaintiff, and cited, in addition, the following authorities:—Jarman on Wills, 3rd ed., vol. 1, p. 159, 160, Sugden's Law of Property, pp. 217, 218, *Daly v. Daly (l)*, *Earl of Hardwicke v. Douglas (m)*, *Phillips v. Allen (n)*, *Ravens v. Taylor (o)* *Boulcott v. Boulcott (p)*, *Read v. Backhouse (q)*.

*Cur. adv. vult.*

The judgment of the Court was now delivered by

POLLOCK, C. B.—This was an action of ejectment brought to recover certain premises situate at Hogeston, in the county of Pembroke, and was tried before my brother *Channell* at the Summer Assizes for that county, in the year 1862.

Evidence was given, and it is not now disputed, that one Robert Robertson, who died on the 31st of December, 1820, was, at the time of his death, seised in fee of thirteen sixteenths of the property in question.

It was not proved that he died seised of the other three sixteenths.

By consent, a verdict was entered for the defendants for

(a) 6 Man. & G. 813.

(b) 2 De Gex, F. & J. 474.

(c) 14 Beav. 583.

(d) 5 De Gex, M. & G. 704.

(e) 1 E. & B. 727.

(f) 8 De Gex, M. & G. 368.

(g) 16 Beav. 173.

(h) 18 Q. B. 197.

(i) 2 B. & P. 485.

(k) 11 Q. B. 466.

(l) 2 Jo. & L. 752.

(m) 7 Cl. & F. 795.

(n) 7 Sim. 446.

(o) 4 Beav. 425.

(p) 2 Drew. 25.

(q) 2 R. & My. 546.



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three sixteenths, and for the plaintiff as to the other thirteen sixteenths, leave being reserved to the defendants to move to enter a nonsuit, or to enter a verdict for the defendants for the whole.

A rule nisi to this effect was accordingly granted, and came on for argument last Hilary Term before myself and my brothers *Channell* and *Wilde*, when the Court took time to consider its judgment. I have now to deliver the judgment of myself and Baron *Channell* (a).

The question is, whether a life estate devised to the plaintiff by a will of the said Robert Robertson, dated the 22nd of October, 1802, and which life estate was expectant on the deaths of two persons, sons of the testator, viz., Bowen Robert Robertson and George William Wheeler Robertson, without issue, was revoked by a testamentary instrument of the date of the 31st of December, 1819, described by the testator as a codicil to his will of the 22nd October, 1802.

At the date of his will, the testator had two estates, the Westbury estate, not the subject of this action, and the Hogeston estate, the property now in dispute. He had two sons, an elder son George William Wheeler Robertson, and a second son Bowen Robert Robertson, and he had two illegitimate children by one Elizabeth James, his house-keeper, viz., a son, the present plaintiff, and a daughter.

By the will the testator devised his estate called the Westbury Hill estate to trustees to the use of his eldest son George William Wheeler Robertson for life, with remainders to the sons and daughters of George in tail, with remainders to his second son Bowen Robert Robertson, with remain-

(a) In the interval between the day on which the case was argued and the day when judgment was pronounced *Wilde*, B., had been appointed Judge Ordinary of the Probate and Divorce Court.

ders to his sons and daughters in tail, with remainder to the plaintiff for life, and a remainder in fee to one Alexander Thomson.

The testator then proceeded to dispose of the Hogeston estate, the property now in dispute.

This estate, subject to certain rent charges and annuities, he devised to trustees to the same uses as were limited with respect to the former estate (the Westbury Hill estate), but placing, as to the estate now in question, Bowen Robert Robertson, the second son, before George William Wheeler Robertson the eldest son. The annuities given by the will by way of rent charge were, an annuity of 21*l.* to the plaintiff, 5*l.* to his illegitimate daughter Mary, 12*l.* to his housekeeper Elizabeth James, mother of the plaintiff and of the illegitimate daughter, and 30*l.* to one Mrs. Letitia Robertson.

The testator then, after various pecuniary and specific bequests to his executors and other friends, and a legacy of 5*l.* to his servant Elizabeth Powell, if in his service at the time of his death, bequeathed all his leaseholds to Bowen Robert Robertson his second son, and the residue of his personal estate to George William Wheeler and Bowen Robert equally. After the date of the will and before the date of the codicil George, the eldest son of the testator, died unmarried, viz., in the year 1806.

In the year 1818, Alexander Thomson, to whom the testator had devised the ultimate remainder in fee, died.

In the year following, by a testamentary instrument, duly signed, sealed and attested, dated the 31st December, 1819, which the testator therein declares to be a codicil to be added to and taken as part of his will dated on or about the 23rd October, 1802, he gives to the plaintiff, by the description of his son William Robertson by Elizabeth James, the further sum of 21*l.* annually, in addition to the 21*l.* left him by his said will, making together the sum of 42*l.*, to

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be paid half yearly, in two equal payments, the first to commence six months after his decease; and he gave to his natural daughter Jane, then with Mary Morginis at Haverford West, the sum of 10*l.* per annum, to be paid during her natural life.

He also gave to the female servant living with him at the time of his decease the sum of 5*l.*, provided she had lived in his service twelve months, and 5*l.* more if she had lived two years: and he then gave to his son "Bowen Robert Robertson all his estates and property of every description whatsoever after discharging the above legacies." The said Bowen Robert Robertson died in the year 1861 without issue, and the present plaintiff thereupon claimed the property in question under the life estate devised to him by the will of 1802.

The defendants contend that that life estate was revoked by the testamentary instrument of the 31st December, 1819.

Their first contention is that that instrument is to be taken as a new will, revoking entirely the former will.

This point we may at once dispose of. We think that the express reference which the testator has made to his will, the date of which he mentions, and the obvious confirmation of some of the legacies given by the will, precludes our treating this instrument otherwise than as a codicil to the will of 1802.

But the defendants further contend that, treating it as a codicil, the life estate devised by the will to the plaintiff, expectant on the deaths of Bowen Robert Robertson and George William Wheeler Robertson, without issue, is revoked by the words of the codicil, "I give my son Bowen Robert Robertson all my estate and property whatsoever after discharging the above legacies."

Now, the general rule in interpreting a will and codicil is that the whole of the will takes effect except in so far as

it is inconsistent with the codicil: see *Doe d. Hearle v. Hicks* (a).

The plaintiff's counsel in their arguments mainly rely on the above rule.

They contend that the life estate given by the will to the plaintiff is not inconsistent with anything in the codicil.

They explain the gift in the codicil of all the testator's estate and property to Bowen Robertson by suggesting that the testator intended to dispose of the ultimate remainder in fee which, by his will, he had devised to Alexander Thomson, who had died in the year preceding the making of the codicil. They contend that it was more probable that the testator should have been influenced, at the time he made the codicil, by the death of Alexander Thomson in the preceding year than by that of his son George in 1806, thirteen years previously. The defendants, in the second branch of their argument, in which they assume that this instrument was a codicil, and not a new will, did not dispute the general rule as to the interpretation of a will and codicil.

They contend, however, that an intention to revoke the life estate given to the plaintiff by the will is manifested, not only by the words of the codicil giving all the testator's estates and property to Bowen Robertson, but also by the gift of an additional annuity of 21*l.* to the plaintiff, which they contend was intended to be in lieu of the contingent life interests in the testator's two landed estates.

And the defendants further contended that by the construction suggested by the plaintiff no effect is given to the devise in the codicil to Bowen Robert Robertson, inasmuch as he was heir at law to the testator, and would have taken as heir.

But so many cases of devises to heirs are found in the

(a) 1 Cl. & F. 20.

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books, that a devise to one who is heir cannot be considered such a disposition of property as necessarily shews some other intention on the part of the testator, as, for instance, an intention to revoke a previous devise. Many cases were cited on both sides; but it is unnecessary for us to review them in detail, because we agree with a remark made by Mr. Jarman in his work on wills (page 146, last edition), that the cases on this point are for the most part too special to be of much use as general authorities, and we think that each case must be decided from the particular words used, having regard, of course, to the main principles laid down on the subject.

Now in the same case, *Doe dem. Hearle v. Hicks* (a), in which we find the general rule above referred to, we find it laid down that "If the devise in the will is clear, it is incumbent on those who contend that it is not to take effect by reason of a revocation in the codicil, to shew that the intention to revoke is equally clear and free from doubt with the original intention to devise, for if there is only a reasonable doubt whether the clause of revocation was intended to include the particular devise, then undoubtedly such devise ought to stand."

This principle was acted upon in *Williams v. Evans* (b), in which case a clear devise of tithes in the will was held not to be revoked by a general devise of "all my real estates,"—a case entitled to the more weight, because the Court, out of deference to the Vice Chancellor of England, took time to consider, but finally overruled his judgment in *Evans v. Evans* (c).

In the present case the words of the gift to Bowen Robert Robertson in the codicil, though doubtless sufficiently large to pass the fee, are less clear than the exact limitations of

(a) 1 Cl. & F. 20.


(b) 1 E. & B. 727.

(c) 17 Sim. 86.

estates contained in the will. It is also evident from the reference to the will, and from the words giving legacies in the codicil, that the gift to Bowen Robert Robertson, though expressed to be "after discharging the above legacies," is intended to be also subject to the legacies bequeathed by the will, for the new annuities are described to be "additional annuities," and it does not clearly appear to us that it was not intended that that gift to Bowen Robert Robertson should be also subject to the life estate given by the will to the plaintiff.

Therefore, on the principle above stated, that it is for the defendant in this case to shew the revocation, we give judgment for the plaintiff, and the rule obtained by the defendant will be discharged.

Rule discharged.

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## IN THE EXCHEQUER CHAMBER.

(*Error from the Court of Exchequer.*)

ROBERTS v. ORCHARD.

Dec. 2.

**E**RROR on a bill of exceptions.—The declaration was in trespass for assault and false imprisonment.

Where a statute requires notice of action for

anything done in pursuance of it; the proper question for the jury is, whether the defendant bona fide believed in the existence of a state of facts which, if they had existed, would have afforded a defence to the action.

Therefore where a statute (24 & 25 Vict. c. 96, s. 103,) provided that any person *found committing* any offence punishable, either upon indictment or upon summary conviction, by virtue of that Act, might be immediately apprehended without a warrant, and also required notice of action for anything done in pursuance of the Act; in an action by the plaintiff, a shopman of the defendant, for giving him into custody on the charge of stealing a florin:—*Held*, that it would not have been sufficient to leave to the jury the question whether the defendant honestly believed that the plaintiff had wrongfully taken the florin, and that in giving the plaintiff into custody he was executing a legal power, but the question ought also to be left to the jury whether the defendant believed that the plaintiff had been found committing the offence.

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Plea.—Not guilty (by statute 24 & 26 Vict. c. 96, ss. 4, 68, 103, 113).

The case was tried before *Martin*, B., at the Middlesex sittings after Michaelmas Term, 1862, and the evidence set out in the bill of exceptions, so far as material, was as follows:—The plaintiff stated that he was a silk salesman in the service of the defendant, who was a draper in Argyle Street, London. On the 8th of February, 1862, the plaintiff sold to a customer goods to the amount of 8s. 5d., and received in payment a sovereign, which he took to the cashier, got from him the change and gave it to the customer, without counting it. The next sale was of goods to the amount of 18s., and the plaintiff also received from the customer a sovereign which he took to the cashier, got change and gave it to the customer. In about ten minutes after the last sale the defendant called the plaintiff into the counting house, and asked him what silver he had about him. The defendant took from his pocket all the silver money he had loose in that pocket, viz. half a crown, a two shilling piece, one shilling and three pence. The defendant said, “You have more than this;” the plaintiff denied it. The defendant said, “You must have more,” and the plaintiff took out his porte-monnaie in which there was 4l. 10s. in gold and six shillings in silver. The defendant said, “You must have more.” The plaintiff said, “Do you suppose that I have anything belonging to you in my possession?” The defendant said, “Well, I don’t say so.” He looked at the money. The plaintiff said, “If you think I have you had better take the usual course, and I will remain here.” The defendant then took away the florin, and returned in about five minutes with a constable, and gave the plaintiff in custody on the charge of stealing a florin. The plaintiff was taken before a magistrate and discharged. The plaintiff said that he had changed a sovereign the day before for his own purposes and received

the florin from the cashier as part of the change. The defendant in his evidence stated that, in consequence of a communication from his cashier, he gave him some marked silver money, and the florin was part of it.

The learned Judge told the jury that, upon the issue and evidence, the circumstance of the defendant not having had the notice of action provided for by the 24 & 25 Vict. c. 96 delivered to him, was no answer to the action, and that the bona fides or mala fides of the defendant was immaterial to the right to the verdict, although it might possibly affect the amount of damages.

The counsel for the defendant requested the learned Judge to direct the jury that the question for them was "whether the defendant believed that the plaintiff had wrongfully taken the said florin, and that in giving the plaintiff into custody, he, the defendant was exercising a legal power, and that if they believed so, the defendant was entitled to the verdict on the ground that the notice of action required by the 24 & 25 Vict. c. 96, had not been given to the defendant."


The learned Judge having refused so to direct the jury, the defendant's counsel tendered a bill of exceptions. The jury found a verdict for the plaintiff, with 200*l.* damages.

*D. D. Keane*, for the plaintiff in error (the defendant below).—The learned Judge should have left to the jury whether the defendant honestly believed that the plaintiff was guilty of embezzlement, and also believed that he, the defendant, had authority by law to take him into custody. By the 24 & 25 Vict. c. 96, s. 103, any person *found committing* any offence punishable either upon indictment or upon summary conviction, with the exception of angling in the day time, may be immediately apprehended without a warrant. Here the defendant found the plaintiff with a

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marked florin in his pocket about ten minutes after he got it. The keeping the florin was a continuance of the offence, so that the plaintiff was "found committing" it within the meaning of the Act. *Cann v. Clipperton* (a) is an authority that even where the jury negative the fact that the plaintiff was found committing the offence, the defendant is entitled to notice of action if he acted under a reasonable belief that the plaintiff was, at the time, committing the offence. [*Williams, J.*—Then the question should have been whether the defendant honestly believed that the plaintiff had been found taking the florin.] By the 68th section of the 24 & 25 Vict. c. 96, if a clerk or servant shall fraudulently embezzle any money received by him for his master, he shall be deemed to have feloniously stolen the same, although it was not received into the possession of his master. By the 113th section, notice is required of an action "for anything done in pursuance of the Act," and to entitle a defendant to notice, it is enough that he bonâ fide believed that he was acting in pursuance of the statute: *Read v. Coker* (b). If the question had been left to the jury, and they had found that the defendant bonâ fide believed that the plaintiff had embezzled the florin, the defendant would have been entitled to the protection of the statute, whether there was reasonable ground for such belief or not: *Hermann v. Seneschal* (c). [*Blackburn, J.*—The party must honestly believe in the existence of the state of facts, which, if true, would constitute a defence to the action. *Willes, J.*, referred to *Hughes v. Buckland* (d).] The belief that the plaintiff had committed the offence, and that the defendant had authority to take him into custody, involves the question whether the defendant believed that the plaintiff had been found committing it.

(a) 10 A. & E. 582.  
 (b) 13 C. B. 850.

(c) 13 C. B., N. S. 392.  
 (d) 15 M. & W. 346.

*J. Brown* (*Laxton* with him) for the defendant in error (the plaintiff below).—The ruling of the learned Judge was correct. To entitle the defendant to the protection of the statute, he must have believed in the existence of a state of facts which, if they had existed, would have justified him in giving the plaintiff into custody. He must, therefore, have believed that the plaintiff was *found committing* the offence. No doubt, a person is entitled to the protection of a statute, although he has not acted in pursuance of it, if he *bonâ fide* intended to do so. According to the old authorities, it was necessary that the defendant should have reasonable ground for his belief; but in *Hermann v. Seneschal* (a), it was held that reasonable ground of belief was only an ingredient in ascertaining the existence of *bona fides*. No case, however, has gone the length of saying that, where a statute authorizes an arrest without warrant where a person is found committing an offence, a party is entitled to the protection of the statute if he honestly believed that the person whom he has given into custody has committed the offence. Upon an examination of the authorities, it will be found that in most of them the question could not arise whether the defendant believed that the plaintiff was *found committing* the offence, because he was taken in the act which was supposed to be an offence. That was so in *Herman v. Seneschal*, *Read v. Coker*, and *Cann v. Clipperton*. The direction, therefore, which was right in *Hermann v. Seneschal*, and which the present exception suggests ought to have been given in this case, would have been a wrong direction. In *Cann v. Clipperton* (b), Lord Denman, C. J., said:—"I am unwilling to say that, if a party acts *bonâ fide* as in the execution of a statute, he is justified at all events, merely because he thinks he is doing what the statute authorizes, if he has not some ground

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(a) 13 C. B., N. S. 392.

(b) 10 A. &amp; E. 588.

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in reason to connect his own act with the statutory provision.”—(He was then stopped by the Court.)

*Keane* replied.

WILLIAMS, J.—We are all of opinion that the judgment of the Court of Exchequer must be affirmed, inasmuch as there is no foundation for the alleged error assigned in the bill of exceptions. Most of the cases on this subject have been cited, and the result of them is, that where the question is whether a defendant is entitled to notice of action under an act of parliament of this nature, the proper way of leaving the question to the jury is this:—“Did the defendant honestly believe in the existence of those facts which, if they had existed, would have afforded a justification under the statute?” The law was so laid down by *Erle*, C. J., and myself in the case of *Herman v. Seneschal* (a), and that appears to me good law and the result of the authorities. It has been contended that it is enough if the defendant bonâ fide thought he was acting according to law, and that it is not necessary that he should believe that he was acting under an authority conferred upon him by law. To a certain extent that argument is well founded; that is to say, in order to entitle a defendant to notice of action, it is not necessary that he should know of the existence of the particular enactment. But all difficulty is obviated by the rule of law to which I have adverted, and which seems to me a convenient rule and in accordance with justice and the intention of the legislature.

Taking that to be the law, it remains to consider how it is to be applied to the present case. Here the ordinary course was not pursued of pleading that a felony had been committed by some one, and that the defendant had

(a) 13 C. B., N. S. 392.

reasonable ground for believing that the plaintiff was the guilty person. We cannot entertain any question except that raised by the bill of exceptions. Had the defendant chosen to rely on a state of facts which, if found by the jury, would have enabled him to avail himself of the want of notice of action under this particular act of parliament, the objection might have been raised by an inquiry being submitted to the jury, not simply whether the defendant believed that the plaintiff was guilty of stealing the florin, but also whether he believed that the plaintiff had been *found committing* the offence. If that question had been left to the jury, they might have come to a conclusion on one part of the inquiry in favour of the plaintiff, and on the other in favour of the defendant. If the jury found the first part in the affirmative, viz., that the defendant believed that the plaintiff had been guilty of stealing the florin, and the latter part in the negative, viz., that the defendant did not believe that the plaintiff had been found committing the offence, that would have disentitled the defendant to notice of action. But the objection to the summing up of the learned Judge, was not that he omitted to leave to the jury both branches of the inquiry, but the single one whether the defendant believed that the plaintiff had wrongfully taken the florin. If the learned Judge had yielded to that objection, and left to the jury the question proposed on behalf of the defendant, that would have been a misdirection and the subject of a bill of exceptions on the part of the plaintiff; because the inquiry of the jury would have been confined to the single fact of the defendant's belief as to the plaintiff's commission of the offence, and would not have been directed to the equally essential inquiry, whether the defendant believed that the plaintiff was *found committing* the offence. I agree with the argument of counsel that if

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the facts were such that the jury could not possibly have thought that the defendant believed in the fact of the offence being committed by the plaintiff, without also thinking that he believed in the fact that the plaintiff was found committing it, the leaving the one inquiry would be sufficient, and the other might be omitted. But here, supposing the true question had been submitted to the jury, upon these facts, if they had found that the defendant believed in the existence of the theft, but did not believe that the plaintiff was found committing it, I do not think that the verdict could have been disturbed, for there was evidence upon which the jury might have found either one way or the other. Therefore the leaving one branch of the inquiry to the jury, in the manner suggested, would not have decided the question whether the defendant believed that the plaintiff was found committing the offence, and therefore entitled to notice of action. Consequently there was no sufficient exception to the ruling of the learned Judge, and the judgment of the Court below must be affirmed.

WILLES, J.—I am of the same opinion. I entirely concur with my brother *Williams* as to the proper direction in a case of this kind. That part of the exception which is in these words “and that in giving the plaintiff into custody he, the defendant, was exercising a legal power,” seems to me immaterial. It is clear upon the true construction of the exception that all that the defendant’s counsel wished the learned Judge to leave to the jury was, whether the defendant honestly believed that the plaintiff had wrongfully taken the florin. He did not wish the Judge to leave to the jury the question whether the defendant believed that the plaintiff had been *found committing* the felony. Leaving to the jury the question whether the defendant believed

that he was exercising a legal power, would have been an insufficient direction without telling the jury what would be such a legal power. It is clear to my mind from the defendant's evidence in answer that he was acting on mere suspicion.

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BLACKBURN, J., KEATING, J., and MELLOR, J., concurred.  
 Judgment affirmed.

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IN THE EXCHEQUER CHAMBER.

(*Appeal from the Court of Exchequer.*)

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ANNE DUMERGUE v. RUMSEY and another.

Dec. 7.

**T**HIS was an appeal against the decision of the Court of Exchequer in making absolute a rule to enter the verdict for the defendants, pursuant to leave reserved at the trial of an interpleader issue.

The case stated on appeal (so far as material) was as follows.—By agreement made the 28th November, 1861,

A tenant was let into possession of certain premises, which he was to fit up for musical performances upon the terms contained in a draft lease, which pro-

vided that he should at all times during the term keep sufficient and suitable fixtures and moveable furniture and effects on the premises for that purpose, and that none of such moveable furniture and effects should be removed therefrom, except for the purpose of repair or of being replaced by others; and also that in case the term should be determined by effluxion of time, but in no other, it should be lawful for the lessee, within twenty-one days after the expiration of the term, but not during any other period, to remove such fixtures, if any, as he might have affixed to the premises, unless the landlord should elect to purchase the same. It was also provided that if the lessee became bankrupt or insolvent, or if any distress or writ of extent or execution should be lawfully levied or executed by seizure on the said premises, it should be lawful for the lessor to re-enter and repossess the premises as in his former estate and to seize and retain for his own use all fixtures whatsoever, tenant's or trade fixtures. The lessee annexed to the premises certain fixtures suitable for the purpose aforesaid, and which a jury found were tenant's fixtures. These fixtures were seized by a sheriff under a writ of fi. fa. issued upon a judgment recovered by a creditor against the lessee. Thereupon the lessor claimed the fixtures.—*Held*, in the Exchequer Chamber (reversing the judgment of the Court of Exchequer), that by the terms of the agreement the lessee had renounced the ordinary right of a tenant to disannex tenant's fixtures during the term, and consequently the sheriff had no power to take them in execution.

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between the plaintiff, Anne Dumergue (therein called the lessor), of the one part, and William Flint (therein called the lessee), of the other part, it was agreed, amongst other things, as follows :—

1. The lessor should immediately give to the lessee possession of St. Martin's Hall, Long Acre, in the county of Middlesex, with the appurtenances, except the cellars expressed to be excepted and reserved in and by the draft intended lease set forth in the second schedule thereto.

2. The lessee should immediately commence and diligently and continuously prosecute the execution in and about such premises of the works mentioned in the first schedule thereto, and such other works as should be requisite to fit the premises as a place for public musical performances, and other public purposes for which the same might be used, according to the said draft intended lease, and provide the same with suitable seats and other moveable effects, before the 1st March, 1862, and lay out in and about such works and effects at least the sum of 1000*l.* by that day. And it was further agreed that such time should be deemed the essence of that contract, and that if the stipulation in that behalf should not be complied with the lessor might, immediately or at any time after the breach thereof, re-enter and take possession of and retain for her own use the said premises and all fixtures which the lessee should have placed in and about the same.

4. The lessor, on full compliance by the lessee with clauses, &c., should execute on the request of the lessee, and the lessee, his executors, &c., should at any time, at the lessor's request, accept and execute a counterpart of a lease of the said premises in the form set forth in the said second schedule.

5. In the meantime, and until the execution of such lease, the lessee should observe, perform, and be bound by

all the covenants and provisions to be therein contained as fully as if the same were executed.

The first schedule contained a specification of the works and fittings, which included the laying all necessary gas, piping, fitting up, and fixing chandeliers, sun-lights, star-lights, pendants, &c., for lighting the stage.

The second schedule (so far as material) was as follows:—

This indenture made the       day of       1860, between Anne Dumergue, of, &c., of the one part, and William Flint of, &c., of the other part: Witnesseth that in consideration of the rent, covenants, &c., hereinafter reserved and contained on the part and behalf of the said W. Flint to be paid, observed, &c., the said Anne Dumergue doth hereby demise and lease unto the said W. Flint, his executors, &c., (inter alia), all that building and premises known as St. Martin's Hall, and whereof part is constructed as a Hall and otherwise for use for musical entertainments and purposes connected therewith, and the remainder, being the rooms over the entrance from Long Acre, is constructed for use as a private residence: habendum from the 19th December, 1861, for the term of ten years thence next ensuing; paying for the first year of the said term the rent of 1466*l.* 13*s.* 4*d.*, and for the subsequent years, except the last, the rent of 1100*l.*, and for the last year the rent of 733*l.* 6*s.* 8*d.*—After covenants by W. Flint to pay the rents and taxes, there were covenants by him as follows:—

And also shall and will at the expiration or other sooner determination of the said term, surrender and deliver up to the said Anne Dumergue, her executors, &c., all the doors, locks, keys, bolts, bars, fastenings, hinges, glass and glazed windows, sashes, marble and other hearths, slabs, wainscots, partitions, cisterns, closets, shelves, leaden pipes, tubes, gutters of lead, and other things which now are and which from time to time during the said term shall be fixed or

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Dumergue, her executors, &c., at any time before the expiration of two years from the 19th December, 1861, and after six calendar months previous notice of her or their intention so to do shall have been given to the said W. Flint, his executors, &c., or left upon the demised premises, and if the said W. Flint shall not previously to the expiration of such six calendar months notice have elected and agreed in writing to purchase the said premises, to re-enter into the said demised premises, or any part thereof in the name of the whole, and to determine the said term hereby granted; and in that event shall take and retain for her and their own absolute property all the tenant's fixtures and moveable fittings and effects in, about, or belonging to the said Hall or any of the public portion of the demised premises, inclusive of gas chandeliers, gas pipes, and all other gas fittings, and she or they the said Anne Dumergue, her executors, &c., shall pay for such tenant's fixtures and moveable fittings and things so taken and retained such sum not exceeding 1500*l.* as shall be the fair value thereof.

Before the making of the said agreement there were upon the premises certain goods and chattels and certain fixtures and things, and the said W. Flint, after the making of the said agreement and in pursuance thereof, brought in and upon the said demised premises other goods and chattels, and affixed therein certain other fixtures and things.

On the 5th February, 1862, the sheriff of Middlesex entered upon the premises and seized in execution the whole of the goods, chattels, fixtures, and things so brought and then being in and upon and affixed to the premises, under a writ of fieri facias, tested on the said 5th February, 1862, issued upon a judgment for 2938*l.* recovered by the defendants against the said W. Flint.

On the 14th of February, and before any sale, the plaintiff served the sheriff with a notice that she claimed all the

fixtures whatsoever and all gas chandeliers and other fittings, and that all the seats in and upon the said premises were her property.

Thereupon the sheriff took out the usual interpleader summons, upon which a Judge ordered an issue to be tried in which the question was whether all the fixtures whatsoever, and all gas chandeliers and other gas fittings, and all the seats in and upon the premises, as particularized in the claim of the said Anne Dumergue made and served on the sheriff of Middlesex, on the 14th February, 1862, were at the time of the said seizure the property of the claimant, Anne Dumergue, as against the defendants, the execution creditors.

The issue was tried on the 30th April, 1862, before *Channell, B.*, when an inventory of the articles seized was put in evidence, and the jury found that all the articles in the said inventory were tenant's fixtures, that such as were fixed to the premises were articles that could easily be detached from the premises, and that any injury in detaching them could be repaired easily and at a slight expence, and that they were brought in or put up for the purpose of the business to which the place was to be applied.

Upon this finding a verdict was by consent entered for the plaintiff, leave being reserved for the defendants to move to enter the verdict for them.

A rule nisi was accordingly granted, upon the ground that upon the facts admitted and proved there was no sufficient evidence to support the plaintiff's claim to the property in question against the defendants, and that, upon these facts and the finding of the jury, it appeared that, the goods in question were the property of the defendants as against the plaintiff. This rule was made absolute.

The question for the opinion of the Court is, whether or not the Court below were right in making the above rule

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absolute. If the Court shall be of opinion in the negative, the verdict for the claimant, Anne Dumergue, is to stand. If the Court shall be of opinion in the affirmative, the verdict for the claimant is to be set aside and a verdict entered for the defendants.

*Raymond* argued for the claimant (a).—The question turns upon the construction of the agreement, and its effect upon the rights of the lessee. The jury have found that the fixtures were tenant's fixtures, and that they were brought on the premises for the purpose of the business to which the place was to be applied. The original rule of law was that everything fixed to the freehold became part of it. *Quicquid plantatur solo solo cedit*. Upon that rule was engrafted this qualification, that a tenant is entitled to remove such articles as come within the definition of tenant's fixtures. It is also clear that a judgment creditor may take in execution tenant's fixtures; but the right of the creditor can be no greater than that of the tenant. This case differs from the ordinary case of landlord and tenant, because there it is optional with the tenant whether he will annex any article to the freehold. Here the object was to fit up the demised premises as a place for musical entertainments, and therefore part of the consideration for the agreement was the undertaking by the tenant to provide fixtures and moveable furniture and effects suitable for that purpose. By the terms of the agreement the tenant has no absolute right to remove the fixtures, but only a contingent right, in the event of the term being determined by effluxion of time, to remove them within twenty-one days unless the landlord shall elect to purchase them. [*Blackburn, J.*—Is there any case which has determined that a landlord who has re-entered

(a) Before *Williams, J., Willes, J., Byles, J., Blackburn, J., Keating, J., and Mellor, J.*

upon a forfeiture is entitled to the growing crops?] In *Davis v. Eyton* (a) a lease was granted on condition that if the lessee should incur any debts upon which judgment should be signed and execution issue against him, the lessor might re-enter as of his former estate; and the lessor, having re-entered after judgment and execution, it was held that he was entitled to the emblements. The seizure by the sheriff put an end to the term; and the intention apparent on the face of the agreement was, that if the term should be determined by forfeiture the lessee should not remove the fixtures or effects, but they should belong to the lessor: *Rex v. Topping* (b). [*Blackburn, J.* The seizure by the sheriff is not enough, there must be an election on the part of the lessor to take them.] There is a covenant by the lessee to deliver up, at the expiration or other "sooner" determination of the term, certain fixtures enumerated and other things which now are, and which from time to time during the said term shall be fixed or fastened within or about the said building or premises. The tenant having no right to remove the fixtures or moveable articles, they cannot be taken in execution by the sheriff; *Minshall v. Lloyd* (c).


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*W. G. Harrison*, for the execution creditors.—The lessor never had any property in the moveable furniture and effects. The provision, that moveable furniture and effects of the value of 500*l.* should remain on the premises, was merely for security in case of distress. [*Williams, J.* There is no doubt about the moveables.] Then with respect to the fixtures, the jury have found that they were tenant's fixtures, and that such as were affixed to the premises could be easily detached. They are therefore in the same position as the

(a) 7 Bing. 154.

(b) M'Cl. & Y. 544.

(c) 2 M. & W. 450.


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moveable furniture. There are certain articles, such as gas chandeliers, which, though not strictly tenant's fixtures, would be distrainable for rent, and consequently might be taken in execution. In *Amos on Fixtures*, chap. 11, sect. 11, p. 321, it is said:—"It seems to have been formerly considered that things annexed to the freehold were not liable to be taken in execution, like the moveable goods and chattels of a debtor. But this rule of law has given way to a more liberal construction in favour of creditors in modern times; and for their benefit, *fixtures* are now considered to be so far in the nature of personal chattels, that in certain cases they may be seized and removed under a writ of *fieri facias* or other similar process." [*Byles*, J.—That has reference to cases where fixtures are removable by the tenant; here they are not.] Things affixed to the freehold but capable of being detached without injury to the premises are mere chattels: *Davis v. Jones* (a). The stipulation that the lessor shall be at liberty to purchase the fixtures at the end of the term, shews that the property in them remains in the lessee. The articles not in existence at the time of the agreement would not pass to the lessor under it, unless the lessee did some act with that view after he acquired them: *Lunn v. Thornton* (b). [*Byles*, J.—The lessee has merely a right to remove the fixtures at the end of the term, unless the lessor elects to purchase them.] The agreement does not transfer the property in the fixtures to the lessor. In the case of forfeiture the lessor is to be at liberty to seize and retain the fixtures, but that is subject to the equities which have attached in the meantime. Up to the time of forfeiture the lessor had no property in the fixtures, and there was no forfeiture until the sheriff seized them. [*Willes*, J.—Suppose the lessee had become bankrupt, could his assignees have removed the fixtures?]

(a) 2 B. & Ald. 165.

(b) 1 C. B. 379.

They might. If the lessee had removed them during the term, he would have had a good title to them, though the lessor might have treated that as a forfeiture. Even assuming that the lessee has precluded himself from removing the fixtures during the term, as they are mere chattels they may be taken in execution. The execution creditor does not claim under the lessee, but adversely to him.

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WILLIAMS, J.—We are all of opinion that the judgment of the Court of Exchequer must be reversed, and that the verdict entered for the claimant at the trial must stand.

The question turns entirely upon whether Flint, the tenant, had a right to remove the fixtures in question. There has been some controversy, in the course of the argument, as to the effect of the finding of the jury. We think it amounts to this, that the goods which were the subject of the issue, although annexed to the freehold, were tenant's fixtures, not landlord's fixtures. Then the simple question is, whether the tenant had a right to disannex them from the freehold. If the tenant had no right to disannex them, the sheriff had no right to take them in execution under the writ. No doubt, a tenant may, before the expiration of his term, remove what are called "tenant's fixtures." Then, had the tenant in this case the ordinary right to disannex these fixtures from the freehold during the pendency of his term, or had he by the special terms of the agreement debarred himself from that right?

Now, by a clause in the lease, the tenant undertakes that he will, at the expiration or sooner determination of the term, surrender and deliver up to the lessor certain things enumerated, "and other things which now are, and which from time to time during the said term shall be fixed or fastened within or about the said buildings and premises

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hereby demised, or any part thereof." The Court is not disposed to accede to the argument for the claimant so far as it is founded upon that clause in the agreement. We think, according to the case of *Elliott v. Bishop* (a), that it is a landlord's clause, to secure the giving up those fixtures which are ordinarily called "landlord's fixtures." As to that clause, we give no opinion further than saying that we do not rely upon it as the foundation of our judgment. Then comes a clause that Flint, the tenant, will at all times during the said term keep sufficient and suitable fixtures and effects in and upon the public part of the said premises, for the use thereof for musical entertainments, and which moveable furniture and effects shall always be of the value of 500*l.* at the least, and that none of such moveable furniture and effects shall be removed therefrom save for the purpose of being repaired, or of being immediately replaced by others of equal or greater value." With respect to that clause, the Court does not feel that it forwards the case of the claimant. It amounts to an agreement on the part of the tenant that he will not remove the fixtures; but not to a renunciation of his right to do so. The latter part of the clause treats the fixtures as "moveable furniture," and if that stood alone, it would inevitably lead to the conclusion that the matter rested in agreement only, because if the tenant had no right to remove the moveable furniture it could not be taken in execution; and it is clear that moveables may be taken in execution. The former part of the clause also shews that it is a mere agreement in order to keep up the place as a music hall.

Then comes a clause which provides "that in case the said term shall be determined by effluxion of time, and

(a) 11 Exch. 113.

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shall not be sooner determined under either of the provisos for re-entry hereinafter contained or otherwise, but in no other case, it shall be lawful for Flint, his executors, &c., within twenty-one days next after the expiration of the said term, but not during any other period, to remove such fixtures, if any (other than gas piping, which it is agreed as aforesaid shall in that event be left on the premises), as he or they may have attached to, or placed on the said premises, and as may be lawfully removed," &c. If the words "during any other period" be construed to mean "during any other time before or after the expiration of the lease," that would shew the intention of the parties that the tenant should have no right to remove the fixtures except upon the contingency of the term expiring by effluxion of time. But the expression of intention does not stop there, it is also to be found in that part of the agreement which provides for a forfeiture of the lease in the event of the tenant becoming bankrupt or insolvent, or execution being levied on his goods. The agreement provides that if any such event shall happen, the landlord shall have power to re-enter, and seize and retain, not only fixtures purporting to be tenant's fixtures, "but all fixtures whatsoever, whether tenant's or trade fixtures, or otherwise." That power is almost conclusive to shew the intention of the parties, that these fixtures should not be taken in execution, because the power to re-enter and seize the tenant's fixtures, in the event of his bankruptcy, is inconsistent with the right of the assignees, who, but for that special provision, would clearly have been entitled to disannex them. If the tenant had a right to remove the fixtures an execution against him would enable the sheriff to seize them, and prevent the landlord from exercising his power. The effect of that provision is a renunciation by the tenant



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of the ordinary right to remove tenant's fixtures during the term.

It is contended on the part of the execution creditor, that there is nothing to indicate an intention that the property should vest in the landlord except upon the occurrence of the events specified. But that argument is founded upon a mistaken notion of the nature of fixtures. Notwithstanding the right of a sheriff to seize fixtures, until they are severed from the freehold they are parcel of it, and the lessee could not maintain trover for them: *Mackintosh v. Trotter* (a). This construction of the clause is not inconsistent with the provision as to the tenant's right to remove the fixtures after the expiration of the term; it is merely a stipulation that during the continuance of the lease, the tenant shall not have the ordinary tenant right to remove fixtures.

Another argument was pressed upon the Court, that this was an agreement to annex fixtures to the freehold, and that no property passed in articles afterwards acquired. But the real question is, what are the terms upon which the tenant was to hold? If it appears that he was to hold under the ordinary right to remove tenant's fixtures during the continuance of the term, the sheriff might seize them; but if the intention was (as appears to us) that the tenant should renounce that right, then the sheriff had no power to take the fixtures in execution.

The other Judges concurred.

Judgment reversed.

(a) 3 M. & W. 184.

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Dec. 10.

In this Vacation (10th December) the Honorable Mr. Justice *Wightman*, one of the Judges of the Court of Queen's Bench, died, at York, during the Winter Assize.

He was succeeded by *William Shee*, one of her Majesty's Serjeants-at-law, who afterwards received the honour of Knighthood.

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# Exchequer Reports.

HILARY TERM, 27 VICT.

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Feb. 1.

THE ATTORNEY GENERAL v. THE LANCASHIRE AND  
YORKSHIRE RAILWAY COMPANY.

A railway Company is not liable to be assessed under Schedule (E.) of the Income Tax Acts in respect of engine drivers, porters and labourers, whether employed by them at annual salaries or at weekly wages amounting to 100*l.* a year; but such servants are assessable under Schedule (D.).

Schedule (E.) extends only to offices or employments under corporations which are of a public nature.

BY order of a Judge the following case was stated for the opinion of this Court:—

“ 1. The defendants are a railway Company incorporated by act of parliament, and are subject to the provisions of the Railways Clauses Act, 1845 (8th and 9th Vict. cap. 20), and all other public general Acts relating to railway Companies. In the course and for the purposes of their business as a railway Company the defendants employ many officers, clerks, and servants. Of these some are engaged at fixed annual salaries, payable in some instances by quarterly and in other instances by monthly payments, and the engagement is determinable by either party giving to the other in some instances a year's notice, in other instances a half year's notice, in other instances a quarter's notice; failing such notice the engagement would continue, and would not require to be renewed by either party in order to prevent its coming to an end; but by far the larger number of the said Company's officers, clerks and servants, such as engine drivers, porters and labourers, are engaged at fixed weekly wages payable at the end of each week, and this class of servants have deductions made from their wages in the event of absence from sickness or any other cause. In those cases the engagement is determinable by either party

giving to the other in some instances a month's notice, and in others a week's notice; and officers, clerks, and servants of this latter class are constantly being changed by notice on one side or the other, although failing such notice the engagement would continue, and would not require to be renewed by either party in order to prevent its coming to an end.

"2. The defendants and their officers were duly called upon in the usual way to deliver a list, declaration, or statement in writing, in order that the Commissioners for special purposes under the Income Tax Acts might assess the duties for the year commencing on the 6th of April, 1860, in respect of all offices and employments of profit held in or under the defendants' Company, as duties payable under Schedule (E.), according to the provisions of the 23rd Vict. cap. 14, and the other Acts therewith incorporated; and the defendants and their officers were furnished with the proper forms for that purpose, and were at the same time informed, by the direction of the Commissioners of Inland Revenue, that the said list, declaration, or statement ought, in the opinion of the Commissioners of Inland Revenue, to comprehend all the officers, clerks, and servants so in the employment of the defendants, during the year commencing on the 6th day of April, 1860, whose salaries or wages amounted to the sum of 100*l.* per annum or upwards.

"3. The defendants, however, although willing to comply with this requisition as regards such of their officers, clerks, and servants as are engaged at annual salaries, have refused to comply with it in respect to those engaged at weekly wages.

"4. A similar requisition was made in respect of the succeeding year commencing on the 6th day of April, 1861, and a similar answer to it was made by the defendants.

"5. The question for the Court is:—

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“Whether the defendants are liable to be assessed under Schedule E. in respect of their officers, clerks, or servants who are so engaged as aforesaid at weekly wages as well as in respect of those engaged at annual salaries?”

“If the Court should be of opinion that the defendants are so liable, judgment is to be entered for the Crown for a nominal sum of one shilling, with costs, the defendants agreeing in that case to make the required returns in compliance with the judgment of the Court, and to pay the duty chargeable thereupon.

“If the Court should be of opinion that the defendants are not so liable, judgment is to be entered for the defendants for their costs.”

*The Attorney General* (with whom was *The Solicitor General, Locke and Beavan*), for the Crown (*a*).—The defendants are liable to be assessed under Schedule (E.) There is no ground for any distinction between servants hired by the year or at weekly wages. By the 23 Vict. c. 14, s. 6 (*b*), the Commissioners for special purposes are required to assess the duties payable under Schedule (E.) in respect of all “offices and employments of profit held under any railway Company,” which duties are to be paid by the Company and deducted out of the emoluments or salary of

. (*a*) Jan. 30. Before *Pollock, C. B., Martin, B., Channell, B., and Pigott, B.*

(*b*) Sect. 6.—In like manner as aforesaid the Commissioners for special purposes shall assess the duties payable under Schedule (E.) in respect of all offices and employments of profit held in or under any railway Company, and shall notify to the secretary or other officer of such Company the

particulars thereof, and the said assessment shall be deemed to be and shall be an assessment upon the Company, and paid, collected, and levied accordingly; and it shall be lawful for the Company or such secretary or other officer to deduct and retain out of the fees, emoluments, or salary of each such officer or person the duty so charged in respect of his profits and gains.

such officer or person. The 5 & 6 Vict. c. 35, s. 1 (a), imposes the several duties mentioned in Schedules (A.) (B.) (C.)

(a) Sect. 1.—That from and after the 5th day of April, 1842, there shall be charged, raised, levied, collected, and paid, unto and for the use of her Majesty, her heirs and successors, during the term hereinafter limited, the several rates and duties mentioned in the several Schedules contained in this Act, and marked respectively (A.), (B.), (C.), (D.) and (E.); (that is to say,)

#### SCHEDULE (A.)

For all lands, tenements and hereditaments, or heritages in Great Britain there shall be charged yearly, in respect of the property thereof, for every twenty shillings of the annual value thereof the sum of sevenpence :

#### SCHEDULE (B.)

For all lands, tenements and hereditaments in England there shall be charged yearly, in respect of the occupation thereof, for every twenty shillings of the annual value thereof the sum of threepence halfpenny :

For all lands, tenements and heritages in Scotland, there shall be charged yearly in respect of the occupation thereof, for every twenty shillings of the annual value thereof the sum of twopence halfpenny :

#### SCHEDULE (C.)

Upon all profits arising from annuities, dividends and shares of annuities, payable to any person, body politic or corporate, company or society, whether corporate or not corporate, out of any public revenue, there shall be charged yearly for every twenty

shillings of the annual amount thereof the sum of sevenpence without deduction :

#### SCHEDULE (D.)

Upon the annual profits or gains arising or accruing to any person residing in Great Britain from any kind of property whatever, whether situate in Great Britain or elsewhere, there shall be charged yearly for every twenty shillings of the amount of such profits or gains the sum of sevenpence; and upon the annual profits or gains arising or accruing to any person residing in Great Britain from any profession, trade, employment, or vocation, whether the same shall be respectively carried on in Great Britain or elsewhere, there shall be charged yearly for every twenty shillings of the amount of such profits or gains the sum of sevenpence :

And upon the annual profits or gains arising or accruing to any person whatever, whether a subject of her Majesty or not, although not resident within Great Britain, from any property whatever in Great Britain, or any profession, trade, employment, or vocation exercised within Great Britain, there shall be charged yearly for every twenty shillings of the amount of such profits or gains the sum of sevenpence :

#### SCHEDULE (E.)

Upon every public office or employment of profit, and upon every annuity, pension, or stipend payable by her Majesty or out of the public revenue of the United

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(D.) and (E.). Schedule (D.) (a) consists of two branches, the second of which is material, because if the wages in question are not assessable under Schedule (E.) they must be assessed under Schedule (D.) By the second branch of Schedule (D.) (a) the duty is charged upon the annual profits or gains accruing to any person from any property whatever in Great Britain, or any profession, trade, employment, or vocation exercised within Great Britain. By Schedule (E.) (a) the duty is charged upon every public office or employment of profit. The amount of duty is the same under both Schedules. Reading Schedules (D.) and (E.) without the rules, employment under a railway Company would not come within the definition of "public employment." But the Act, after imposing the tax in that form, proceeds to point out the machinery by which it is to be assessed and collected. The sections from the 24th to the 33rd shew that the legislature thought it convenient that corporations and public bodies should collect the tax from persons who derive their incomes from them, whether in the shape of salaries, fees, wages, or by any other mode of payment. By section 50, every person when required by notice, must deliver to the assessor a list of persons chiefly employed in his service, whether resident in his dwelling-house or not.

By section 100 (b) the duties in Schedule (D.) are to be

Kingdom, except annuities before charged to the duties in Schedule (C.), for every twenty shillings of the annual amount thereof respectively there shall be charged yearly the sum of sevenpence.

(a) *Ante*, p. 795.

(b) Sect. 100 enacts.—That the duties hereby granted, contained in the Schedule marked (D.), shall be assessed and charged under the following rules, which rules shall be deemed and construed to be a part of this Act, and to refer to the

said last-mentioned duties, as if the same had been inserted under a special enactment.

#### SCHEDULE (D.)

The said last-mentioned duties shall extend to every description of property or profits which shall not be contained in either of the said Schedules (A.), (B.), or (C.), and to every description of employment of profit not contained in Schedule (E.), and not specially exempted from the said respective duties, and shall be charged

assessed and charged under certain rules which shall be deemed part of the Act. By section 188 (a), the provisions

annually on and paid by the persons bodies politic or corporate, fraternities, fellowships, companies, or societies, whether corporate or not corporate, receiving or entitled unto the same, their executors, administrators, successors, and assigns respectively.

*Rules for ascertaining the said last-mentioned duties in the particular cases herein mentioned.*

First case.—Duties to be charged in respect of any trade, manufacture, adventure, or concern in the nature of trade, not contained in any other schedule of this Act.

**RULES.**

First.—The duty to be charged in respect thereof shall be computed on a sum not less than the full amount of the balance of the profits or gains of such trade, manufacture, adventure, or concern upon a fair and just average of three years, ending on such day of the year immediately preceding the year of assessment on which the accounts of the said trade, manufacture, adventure, or concern shall have been usually made up, or on the fifth day of April preceding the year of assessment, and shall be assessed, charged, and paid without other deduction than is hereinafter allowed: provided always, that in cases where the trade, manufacture, adventure, or concern shall have been set up and commenced within the said period of three years, the computation shall be made for one year on the average of the balance of the profits and gains from the period of first setting up

the same: provided also, that in cases where the trade, manufacture, adventure, or concern shall have been set up and commenced within the year of assessment, the computation shall be made according to the rule in the sixth case of this schedule.

Second case.—The duty to be charged in respect of professions, employments, or vocations, not contained in any other schedule of this Act.

**RULES.**

First.—The said duty on employments shall be construed to extend to every employment by retainer in any character whatever, whether such retainer shall be annual, or for a longer or shorter period: and to all profits and earnings of whatever value, subject only to such exemptions as are hereinafter granted:

Second.—The duty to be charged shall be computed at a sum not less than the full amount of the balance of the profits, gains, and emoluments of such professions, employments, or vocations (after making such deductions, and no other, as by this Act are allowed,) within the preceding year, ending as in the first case, to be paid on the actual amount of such profits or gains without any deduction, subject to the like provisions as are made in the first case in respect of the period of average, in the cases of setting up and commencing such profession, employment, or vocation within the period herein limited:

(a) Sect. 188.—And be it enacted that every provision in this Act

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applied to any particular schedule shall be applicable to any other schedule, if not repugnant thereto. By the rules for ascertaining the duties in the first case (a) mentioned in Schedule (D.) duty is to be computed on the full amount of the profits and gains of trade, manufacture, &c., upon an average of three years, ending on the day of the year preceding the year of assessment. The "second case" (a) mentioned in the rules relates to "the duty to be charged in respect of professions, employments, or vocations, not contained in any other schedule of the Act." Therefore, that would include the salaries in question, unless they are within Schedule (E.) By the first rule (a) "the duty on employment is to extend to every employment by retainer in any character whatever, whether such retainer shall be annual, or for a longer or shorter period." That rule is quite as applicable under Schedule (E.) as under Schedule (D.), and therefore by virtue of the 188th section (a) must be applied to Schedule (E.), so that employment in any capacity whatever, and whether annual or weekly, is within the meaning of the word "employment" in Schedule (E.) By the second rule (a) the duty is to be computed at not less than the full amount of the balance of the profits within the preceding year. That differs from the first case (a) of the rules of Schedule (D.) in this respect, that the duty upon trade profits is to be computed upon an average of three years, but the duty upon professions, employments, or vocations, is to be computed on the profits of the last year assessed. There was also this slight difference between "employments" under Schedule (D.) and "employ-

contained, and applied to the duties in any particular schedule, which shall also be applicable to the duties in any other schedule, and not repugnant to the provisions for charging, ascertaining, or levying the duties in such other schedule, shall, in charging,

ascertaining, and levying the same, be applied as fully and effectually as if the application thereof had been so expressly and particularly directed; anything herein contained to the contrary notwithstanding.

(a) *Ante*, p. 797.

ments" under Schedule (E.), that under the former the duty was charged on the return of the preceding year, whereas under Schedule (E.) it was charged on the return of the current year. So long as the legislature dealt to that extent in the same way with "employments" within either schedule, there was no inducement for anyone to make a distinction between them. But a subsequent Act, 16 & 17 Vict. c. 34, s. 48 (a), required the duty under Schedule (D.) in respect of professions, employments, or vocations, to be computed upon a three years average of the profits instead of the amount of profits within the preceding year. By the 133rd section of the 5 & 6 Vict. c. 35 (b), if any person charged with duty


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(a) Sect. 48.—The duty to be charged under Schedule (D.) in respect of professions, employments, or vocations not contained in any other schedule of this Act shall be computed on a sum not less than the full amount of the balance of the profits, gains, and emoluments of such professions, employments, or vocations upon a fair and just average of three years, instead of the amount of such profits, gains, and emoluments within the preceding year, as directed by the rules of Schedule (D.) in the said Act of the fifth and sixth years of her Majesty, chapter thirty-five, but subject in all other respects to the said last-mentioned rules.

(b) Sect. 133.—And be it enacted, that if within or at the end of the year current at the time of making any assessment under this Act, or at the end of any year when such assessment ought to have been made, any person charged to the duties contained in Schedule (D.), whether he

shall have computed his profits or gains arising as last aforesaid on the amount thereof in the preceding or current year, or on an average of years, shall find, and shall prove to the satisfaction of the Commissioners by whom the assessment was made, that his profits and gains during such year for which the computation was made fell short of the sum so computed in respect of the same source of profit on which the computation was made, it shall be lawful for the said Commissioners to cause the assessment made for such current year to be amended in respect of such source of profit, as the case shall require, and in case the sum assessed shall have been paid, to certify under their hands to the Commissioners for special purposes at the head office for stamps and taxes in England the amount of the sum overpaid upon such first assessment, and thereupon the said last mentioned Commissioners shall issue an order for the repayment of such sum as

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under Schedule (D.) shall, at the end of the current year, find his profits within the year less than he has computed them, the Commissioners may amend the assessment and order any sum overpaid to be repaid. The 134th section (a) contains a similar provision in case any person charged under Schedule (D.) shall cease to exercise his profession, or carry on his trade, employment, or vocation, or shall die, or become bankrupt or insolvent before the end of the year

shall have been so overpaid, and such order shall be directed to the Receiver General of stamps and taxes, or to an officer for receipt or collector of the duties granted by this Act, or to a distributor or sub-distributor of stamps, and shall authorize and require the repayment of the said sum so overpaid as aforesaid, in like manner as is hereinbefore provided with respect to the allowances to be granted under No. V. of Schedule (A.) of this Act.

(a) Sect. 134. — And be it enacted, That in case any person charged to the said duties under Schedule (D.), whether the computation thereon shall have been made on the profits of one year or on an average, as herein allowed, shall cease to exercise the profession, or to carry on the trade, employment, or vocation, in respect whereof such assessment was made, or shall die, or become bankrupt or insolvent before the end of the year for making such assessment, or shall from any other specific cause be deprived of or lose the profits or gains on which the computation of duty charged in such assessment was made, it shall be lawful for such person, or his executors or admi-

nistrators, to make application to the Commissioners for general purposes of the district within three calendar months after the end of such year, and on due proof thereof to their satisfaction the said Commissioners shall cause the assessment to be amended, as the case may require, and give such relief to the party charged, or his executors or administrators, as shall be just, and in cases requiring the same the said Commissioners shall direct, in manner before mentioned, repayment to be made of such sum as shall have been overpaid on the assessment amended or vacated: Provided always, that where any person shall have succeeded to the trade or business of the party charged, no such abatement shall be made, unless it shall be proved to the satisfaction of the said Commissioners that the profits and gains of such trade or business have fallen short from some specific cause, to be alleged to them and proved, since such change or succession took place, or by reason thereof, but such person so succeeding to the same shall be liable to the payment of the full duties thereon without any new assessment.

for making the assessment. Those provisions are applicable to all employments whether under monthly or a weekly hiring, and whether within Schedules (D.) or (E.), so that if any person is dismissed before his salary or wages amount to 10*l.*, he can get back the duty which has been deducted.

By the 146th section (a) the duties in Schedule (E.) are to be assessed and charged under certain rules, which are to

(a) Sect. 146.—And be it enacted, that the duties hereby granted contained in the Schedule marked (E.) shall be assessed and charged under the following rules, which rules shall be deemed and construed a part of this Act, and to refer to the said last-mentioned duties, as if the same had been inserted under a special enactment.

SCHEDULE (E.)

Rules for charging the said duties.

First.—The said duties shall be annually charged on the persons respectively having, using, or exercising the offices or employments of profit mentioned in the said Schedule (E.), or to whom the annuities, pensions, or stipends mentioned in the same Schedule shall be payable, for all salaries, fees, wages, perquisites, or profits whatsoever accruing by reason of such offices, employments, or pensions, after deducting the amount of duties or other sums payable or chargeable on the same by virtue of any act of parliament, where the same have been really and bona fide paid and borne by the party to be charged; and each assessment in respect of such offices or em-

ployments shall be in force for one whole year, and shall be levied for such year without any new assessment, notwithstanding a change may have taken place in any such office or employment, on the person for the time having or exercising the same; provided that the person quitting such office or employment, or dying within the year, or his executors or administrators, shall be liable for the arrears due before or at the time of his so quitting such office or employment or dying, and for such further portion of time as shall then have elapsed, to be settled by the respective Commissioners, and his successor shall be repaid such sums as he shall have paid on account of such portion of the year, as aforesaid; and each assessment in respect of such annuity, pension, or stipend shall be in force for one whole year, unless the same shall cease or expire within the year, by lapse, death, or otherwise, from which period the assessment thereon shall be discharged.

Second.—The said duties to be assessed by the respective Commissioners for all the offices in each department in the place where the said Commissioners shall execute their offices, al-

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be deemed and construed as part of the Act. First, (a) the duties are to be annually charged on the persons respectively

though certain of the offices in the same department may be executed elsewhere, and shall be due and payable from the respective officers, and their respective successors, for the time being.

Third.—The said duties shall be paid on all public offices and employments of profit of the description hereinafter mentioned within Great Britain (viz.), any office belonging to either House of Parliament, or to any Court of justice, whether of law or equity, in England, or Scotland, Wales, the Duchy of Lancaster, the Duchy of Cornwall, or any criminal or justiciary or ecclesiastical Court, or Court of admiralty, or commissary Court, or Court-martial; any public office held under the civil government of her Majesty, or in any County Palatine, or the Duchy of Cornwall; any commissioned officer serving on the staff, or belonging to her Majesty's army, in any regiment of artillery, cavalry, infantry, royal marines, royal garrison battalions, or corps of engineers, or royal artificers; any officer in the navy, or in the militia or volunteers; any office or employment of profit held under any ecclesiastical body, whether aggregate or sole, or under any public corporation, or under any company or society, whether corporate or not corporate; any office or employment of profit under any public institution, or on any public foundation, of whatever nature or for whatever purpose the same

may be established; any office or employment of profit in any county, riding, or division, shire or stewartry, or in any city, borough, town corporate, or place, or under any trusts or guardians of any fund, tolls, or duties to be exercised in such county, riding, division, shire, or stewartry, city, borough, town corporate, or place; and every other public office or employment of profit of a public nature.

Fourth.—The perquisites to be assessed under this Act shall be deemed to be such profits of offices and employments as arise from fees or other emoluments, and payable either by the Crown or the subject, in the course of executing such offices or employments, and may be estimated either on the profits of the preceding year, or of the fair and just average of one year of the amount of the profits thereof in the three years preceding; such years in each case respectively ending on the 5th day of April in each year, or such other day of each year on which the accounts of such profits have been usually made up.

Fifth.—In all cases where any salaries, fees, wages or other perquisites or profits, or any annuities, pensions or stipends, shall be payable at any public office, or by any officer of her Majesty's household, or by any of her Majesty's receivers or paymasters, or by any agent employed in that behalf, the duties chargeable under this Act in respect of such salaries,

(a) *Ante*, p. 801.

having, using or exercising the offices or employments of profit mentioned in Schedule (E.), for all salaries, fees, wages, perquisites or profits whatsoever, and such assessment is to be in force for one year; "provided that the person quitting such office or employment shall be liable for the arrears due before or at the time of his so quitting," and "his successor shall be repaid such sums as he shall have paid on account of such portion of the year." By the third rule (a) the duties are to be assessed on all public offices and employments of profit of the description hereinafter mentioned within Great Britain, viz., any office belonging to either house of parliament, or any court of law or equity, any public office held under the civil government, or the army, offices of

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fees, wages, perquisites or profits, or in respect of such annuities, pensions, or stipends, shall be detained and stopped out of the same, or out of any money which shall be payable upon such salaries, fees, wages, perquisites or profits, or upon such annuities, pensions, or stipends, or for the arrears thereof, whenever the same shall happen, and be applied to the satisfaction of the duties on such offices or employments, or on such annuities, pensions, or stipends respectively (not being otherwise paid), in the manner directed by this Act; and whenever the same so payable shall be assessed by the commissioners for general purposes in their respective districts, they shall transmit an account of the amount of the duty assessed to the office where the same are payable, in order that the amount so assessed may be there stopped or detained.

salaries, fees, wages, allowances, or profits of any officer chargeable to the said duties shall not arise out of any of the offices mentioned in the foregoing rule, but shall arise from any other office or employment of profit chargeable to the said duties, and the salaries, fees, wages, perquisites, or profits shall be payable at such office by any officer thereof, or by any receiver of the same respectively, or by any agent employed in that behalf, the duties chargeable under this Act in respect of such salaries, fees, wages, perquisites, or profits shall be detained and stopped out of the same, or out of any money which shall be paid upon such salaries, fees, wages, perquisites, or profits, or for arrears thereof, whenever the same shall happen, and be applied to the satisfaction of the duties (not otherwise paid) in the manner directed by this Act.

Sixth.—In all cases where the

(a) *Anté*, p. 802.

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profit *under any public corporation*, or under any company or society, whether corporate or not corporate, and every other public office or employment of profit of a public nature. By that rule the legislature intended to bring within the same category all employments of profit under any company or society, whether corporate or not, including therefore railway Companies. If any doubt could exist, it would be removed by the 23 Vict. c. 14, s. 6 (a). When the 5 & 6 Vict. c. 35 passed it made no difference to individuals whether employments of profit under railway Companies were assessed under Schedule (D.) or (E.), but to the government it was of importance with reference to the convenient collection of the tax, and they availed themselves of the machinery provided by Schedule (E.) which comprehends all “employments” of profit to the amount of 100*l.* a year, though for a less period than an annual hiring. Where there is a public body through whose hands the salaries of its officers or servants passes, it is convenient and consistent with the principle of the Act to make that public body stop in transitu the tax payable in respect of those salaries. [*Martin, B.*—This case is not within the words of Schedule (E.), for no one would call an engine-driver a person holding a “public office or employment of profit.”] The case is brought within Schedule (E.) by the third rule (b) of that schedule, which says that the duties shall be paid on all public employments of profit under any public corporation, or under any company or society, whether corporate or not corporate; and the 23 Vict. c. 14, s. 6 (a), speaks of “the duties payable under Schedule (E.) in respect of all offices and employments of profit.” [*Martin, B.*—Does not that rather point to such a person as the secretary?] The word “office” does, but the term, “em-

(a) *Antè*, p. 794,

(b) *Antè*, p. 802.

ployment of profit" is large enough to include any kind of employment; and then by the first rule of the second case of Schedule (D.) (a) the duty on employments extends to "every employment by retainer in any character whatever, whether such retainer be annual or for a longer or shorter period." By the fourth rule of Schedule (E.) (b) the perquisites are the profits of offices and employments arising from fees. By the fifth rule (c) the duties on salaries, fees, wages, perquisites or profits, payable at any public office or by the Crown, may be stopped out of the same. [*Martin, B.*—The sixth section of the 23 Vict. c. 14 authorizes the secretary to deduct the duty from the "fees, emoluments, or salary" of the person employed. An engine-driver, and persons of that class, receiving weekly payment would properly be said to have "wages."] The word "emoluments" is large enough to include wages. [*Martin, B.*—But it is used in connection with "fees" and "salary."] The first rule of Schedule (E.) (d) mentions "salaries, fees, wages, perquisites or profits whatsoever." The fifth rule (e) of Schedule (E.) being only applicable to salaries payable at any public office or by the Crown, the sixth rule (f) applies to the duties on all other "salaries, fees, wages, allowances or profits." The 150th section requires the assessors to assess themselves, "and all other officers, clerks, and persons employed in their respective departments of office," which shews that the employment mentioned in the rules of Schedule (E.) embraces not only officers and clerks but all other persons. The 154th section requires the proper officers in the respective departments, and any agent by whom any "salaries, fees, wages, perquisites, or profits shall be payable," to furnish the assessors with a list of all

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(a) *Antè*, p. 797.(b) *Antè*, p. 802.(c) *Antè*, pp. 802, 803.(d) *Antè*, p. 801.(e) *Antè*, p. 802.(f) *Antè*, p. 803.


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such salaries, &c. By the 158th section (a) the duties must be deducted when the salary or wages are payable. That would equally apply to persons paid weekly as to those paid quarterly.

Mellish (*J. A. Russell* with him), for the defendants.—
 The defendants are not liable to be assessed under Schedule (E.) The wages of 2*l.* a week paid to persons in their employ are subject to deductions, in the event of absence or misconduct, so that, upon an average, the income of those persons is less than 100*l.* a year; and this injustice results from the contention on the part of the Crown, that because they are servants of a railway Company instead of a private individual, they are chargeable under Schedule (E.) upon the amount of salary for the current year, instead of being charged under Schedule (D.) upon the average profits of the preceding three years. If the duties are payable under Schedule (D.), the 23 Vict. c. 14, s. 6 (b), does not apply; but if they are payable under Schedule (E.) this practical difficulty arises, that the defendants are bound, every week or month when they pay the wages, to deduct an aliquot portion for the income tax. Again, suppose a servant in their employ at weekly wages amounting to 100*l.* a year, quits at the end of six months, and enters the service of a private individual, how is the assessment to be made, since he would have departed from Schedule (E.) into Schedule (D.) Or suppose a servant was absent from illness. [*Pollock*, C. B.—Then he would not be within either Schedule (D.) or (E.)] But the defendants may have deducted and paid the duty, and he

(a) Sect. 158.—Provided always, and be it enacted, that such of the said duties granted by this Act which may be detained or stopped and deducted out of the sums in respect whereof they shall be charged or deducted shall be respectively detained at such times in each year as the said sums shall be payable to the person entitled thereto.
 (b) *Ante*, p. 795.

would have a right to call on them to pay him the amount, as he was not liable to the tax. Persons engaged at weekly wages are in a different position from a treasurer or secretary, who holds a permanent office. The third rule (a) of Schedule (E.) mentions "any office or employment of profit held under any ecclesiastical body, whether aggregate or sole;" but that cannot apply to the steward or butler of a bishop. [*Pollock*, C. B.—A bishop is not a corporation sole in respect of acts done in his private capacity.]

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The 16 & 17 Vict. c. 34, s. 5, provides that the duties thereby granted shall be assessed, &c. under the regulations and provisions of the 5 & 6 Vict. c. 35. Section 1 imposes the duties. By section 2 (b) the duties are payable in respect of the several properties, profits and gains

(a) *Antè*, p. 802.

(b) Sect. 2.—For the purpose of classifying and distinguishing the several properties, profits, and gains for and in respect of which the said duties are by this act granted, and for the purposes of the provisions for assessing, raising, levying, and collecting such duties respectively, the said duties shall be deemed to be granted and made payable yearly for and in respect of the several properties, profits, and gains respectively described or comprised in the several schedules contained in this Act, and marked respectively (A.), (B.), (D.), and (E.), and to be charged under such respective schedules; (that is to say,)

SCHEDULE (A.)

For and in respect of the property in all lands, tenements, hereditaments, and heritages in the United Kingdom, and to be

charged for every twenty shillings of the annual value thereof:

SCHEDULE (B.)


For and in respect of the occupation of all such lands, tenements, hereditaments, and heritages as aforesaid, and to be charged for every twenty shillings of the annual value thereof:

SCHEDULE (C.)

For and in respect of all profits arising from interest, annuities, dividends, and shares of annuities payable to any person, body politic or corporate, company or society, whether corporate or not corporate, out of any public revenue, and to be charged for every twenty shillings of the annual amount thereof:

SCHEDULE (D.)

For and in respect of the annual profits or gains arising or accru-

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respectively described or comprised in Schedules (A.) (B.) (C.) (D.) and (E.) The word "employment" is used both in Schedules (D.) and (E.), and it must be construed by the words with which it is connected according to the ordinary rule, that a general word following particular words must be construed ejusdem generis with those words. In Schedule (D.) the words are "any profession, trade, employment, or vocation;" in Schedule (E.) "every public office or employment of profit." Then is the employment in question in the nature of a profession, trade, or vocation, or in the nature of a public office or employment of profit? The words "employment of profit" mean a public employment of profit in the nature of an office; though not strictly within that term; one which would last at least for a year and to which there would be a successor. A

ing to any person residing in the United Kingdom from any kind of property whatever, whether situate in the United Kingdom or elsewhere, and for and in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom from any profession, trade, employment, or vocation, whether the same shall be respectively carried on in the United Kingdom or elsewhere, and to be charged for every twenty shillings of the annual amount of such profits and gains:

And for and in respect of the annual profits or gains arising or accruing to any person whatever, whether a subject of her Majesty or not, although not resident within the United Kingdom, from any property whatever in the United Kingdom, or any profession, trade, employment or vocation exercised

within the United Kingdom, and to be charged for every twenty shillings of the annual amount of such profits and gains:

And for and in respect of all interest of money, annuities, and other annual profits and gains not charged by virtue of any of the other schedules contained in this Act, and to be charged for every twenty shillings of the annual amount thereof:

SCHEDULE (E.)

For and in respect of every public office or employment of profit, and upon every annuity, pension, or stipend payable by her Majesty or out of the public revenue of the United Kingdom, except annuities charged to the duties under the said Schedule (C.), and to be charged for every twenty shillings of the annual amount thereof.

labourer hired at weekly wages by one person one week and another person another week, cannot possibly come within the meaning of those words. [*Pollock*, C. B.—Because an engine-driver receives 2*l.* a week, is the Company bound to deduct the tax from each weekly payment?] The effect of the 158th section (*a*) of the 5 & 6 Vict. c. 35, taken in connection with the sixth rule (*b*) of Schedule (E.), is, that if a railway Company employed a person for a fortnight or a month only at wages which would amount to 100*l.* a year, they would be bound to deduct and pay the duty, if the case is within Schedule (E.) [*Pigott*, B.—Would servants who remained in the employ of the Company for a whole year be within Schedule (E.)?] The employment must be in the nature of a public office, such as secretary, treasurer, and perhaps traffic manager. It is doubtful whether a clerk's is such an employment, but certainly that of a person who works for weekly wages or by piece work is not. The first Rule (*c*) of Schedule (E.), (5 & 6 Vict. c. 35, s. 146), contemplates an office to which there may be a successor in the event of resignation or death. [*Pollock*, C. B.—Apparently the statute means that where there is a permanent office, and the wages, whether paid weekly, monthly, or quarterly, amount to 100*l.* a year, although the party changes, the duty is to be assessed under Schedule (E.) But that cannot apply to occasional servants at particular periods of the year.] The third rule (*d*) of Schedule (E.) also shews that the employment must be in the nature of a public office. The use of the word "office" in the sixth rule (*e*) supports that view. The 133rd (*f*) and 134th (*g*) sections in terms apply only to duties under Schedule (D.), and it could never have been intended that, by virtue of the 188th section (*h*), those

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(*a*) *Antè*, p. 806.(*b*) *Antè*, p. 803.(*c*) *Antè*, p. 801.(*d*) *Antè*, p. 802.(*e*) *Antè*, p. 803.(*f*) *Antè*, p. 799.(*g*) *Antè*, p. 800.(*h*) *Antè*, p. 797.

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provisions should apply to persons from whose wages if within Schedule (E.), the duty must be deducted weekly. They would constantly be compelled to apply for return of duty over paid, while persons assessed upon the average of three years profit, or upon the profit of the preceding year would have no occasion to apply for any return except in the case of mistake. The 51st and 53rd sections of the 16 & 17 Vict. c. 34, shew the description of office or employment intended to be included in Schedule (E).

The Attorney General replied.

Cur. adv. vult.

The judgment of the Court was now delivered by

MARTIN, B.—This is a special case for the opinion of the Court, and the question is, whether the defendants are liable to be assessed under Schedule (E.) of the Income Tax Act (5 & 6 Vict. c. 35, and succeeding statutes) in respect of their engine-drivers, porters, and labourers engaged at weekly wages. The defendants have persons in their employment as engine-drivers, porters, and labourers at wages of 40s. per week and upwards, and if their wages during the year amount to 100l. they are liable to Income Tax. By the statute 23 Vict. c. 14, s. 6, the Commissioners may make an assessment upon a railway Company of the duties payable under Schedule (E.) in respect of all offices and employments of profits held under them, which are to be paid by them and deducted out of the emolument or salary of such officer or person. No doubt this is a convenient mode of assessment, but it is only authorized to be done in respect of the duties payable under Schedule (E.), and if the duties upon such persons as the engine-drivers, porters and labourers of a railway Company are not payable

under Schedule (E.) the defendants are entitled to the judgment of the Court, and we are of opinion that the duties are not, but are payable under Schedule (D.).

By the 1st section of the original Income Tax Act, 5 & 6 Vict. c. 35, Schedule (D.), the duty is imposed upon the annual profits or gains arising to any one from any employment; and by one of the rules of this Schedule (sect. 100) the duty on employments shall be construed to extend to every employment by retainer in any character whether it be annual or for a longer or shorter period, and to all profits and earnings of whatever value, provided the amount according to the existing law be 100*l.* a year. Now engine-drivers porters and labourers of a railway Company employed throughout the whole year at weekly wages of 40*s.* a week would fall plainly and directly within Schedule (D.), and we think they do not fall within Schedule (E.). It imposes the duty upon every public office or employment of profit, and upon every annuity, pension or stipend payable by her Majesty or out of the public revenue, except annuities charged in Schedule (C.); and the third rule in Schedule (E.) (s. 146) enacts, that duties under this schedule shall be paid on all public offices and employment of profit of the description thereafter mentioned, viz. offices belonging to the houses of parliament, courts of law and equity, offices in the army, *offices of profit under any public corporation*, and a variety of others; and finally, every other public office or employment of profit of a public nature. We think Schedule (E.) extends only to offices or employment under corporations which are of a public nature, and not to workmen or artizans like engine-drivers, porters and labourers. They hold no public office whatever, and in our opinion are within Schedule (D.), and not within Schedule (E.), and that they must therefore be assessed as directed with respect to Schedule (D.).

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Some sections in the Income Tax Acts were referred to by the Attorney General for the purpose of shewing that if improper assessments were made there were means of obtaining redress; and some were cited by Mr. *Mellish* to shew that the distinction between private employments and public offices was preserved throughout the Act. We think, however, that this case depends upon the schedules themselves and the rules, and that the defendants are entitled to our judgment.

Judgment for defendants.

Jan. 16.

THE ATTORNEY GENERAL v. JOHN PERKINS RUSHTON.

INFORMATION in equity by the Attorney General as follows:—

A testator devised his real estate to his wife for life with remainder in fee to R., a stranger in blood. R. died intestate before the Succession Duty Act, 1853. The testator's wife died after the commencement of that Act, when the defendant, heir at law of R., became beneficially entitled in possession to the property so devised:—  
*Held*, that the property vested in the defendant by a "derivative title" under the disposition made by the will of the testator, within the meaning of the 15th section of the Succession Duty Act, 1853, and consequently the defendant was chargeable, under that section, with 10% per cent. duty, being at the same rate as R. would have been chargeable with.

1. The object of this information is to obtain payment of the duty in respect of the succession of the above named defendant in the real property devised by the will of Joseph Claridge, formerly of East Haddon, in the county of Northampton, but now deceased, and the question for the decision of the Court is as to the proper rate of duty payable by the defendant.

2. The said Joseph Claridge by his will, dated the 29th day of July, 1828, and which was duly executed and attested as was then by law required for the devise of estates of freehold and inheritance, disposed of his real property in the following terms:—"Also all those my several closes or inclosed grounds which I lately bought and purchased of and from John Walker and Thomas Main, and all and singular other my messuages, cottages, closes, lands

and the disposition made by the will of the testator, within the meaning of the 15th section of the Succession Duty Act, 1853, and consequently the defendant was chargeable, under that section, with 10% per cent. duty, being at the same rate as R. would have been chargeable with.

and real estate whatsoever, situate and being at East Haddon aforesaid or elsewhere, with their and every of their appurtenances, I give and devise unto my wife Elizabeth Claridge and her assigns for and during the term of her natural life, and from and immediately after her decease I give and devise all and singular my said real estates with their and every of their appurtenances, unto and to the use of Richard Willock Rushton, otherwise Richard Willock Claridge, the son of my said wife Elizabeth Claridge, and to his heirs and assigns for ever.

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3. The testator, Joseph Claridge, died some time in the year 1832, without altering or revoking the disposition of his real property made by his will as before stated, and leaving the said Elizabeth Claridge his widow, and her son the said Richard Willock Rushton, otherwise Claridge, respectively surviving him.

4. Richard Willock Rushton, otherwise Claridge, died intestate some time in the year 1844, in the lifetime of the said Elizabeth Claridge, his mother, and the tenant for life of the said testator's real property under his before stated will. He left the above named defendant, John Perkins Rushton, his eldest son and heir at law, surviving him, in whom the reversionary interest in the said testator's real property, devised by his will to the said Richard Willock Rushton, otherwise Claridge, as before stated, thereupon became vested.

5. Elizabeth Claridge, the testator's widow, and the tenant for life of his real property, under the disposition thereof made by his said will as before stated, died in the year 1859, after the time appointed for the commencement of the Succession Duty Act, 1853. And by reason of such disposition the defendant upon her death became beneficially entitled in possession to the testator's real property as a succession derived from the said testator. And



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inasmuch as both he and his father were strangers in blood to the said testator, the defendant became chargeable with duty at the rate of 10% per cent. upon the value of such succession.

6. Application has been made to the defendant for payment of the said duty, but he declines to pay the same and denies his liability to the payment thereof.

Prayer (inter alia.)—That it may be declared that the defendant is chargeable with duty in respect of his aforesaid succession at the rate of 10% per cent. upon the value thereof.

The answer of the defendant (so far as material) was as follows:—

1. I admit the statements in the paragraphs numbered 1 to 4, both inclusive, and the statement numbered 6 of the said information to be true.

2. I admit it to be true that the widow of the testator, Joseph Claridge, named in the said information, and the tenant for life of his property under the disposition thereof made by the said testator's will, as stated in the 2nd paragraph of the said information, died in the year 1859, after the time appointed for the commencement of the Succession Duty Act, 1853, and that upon her death I became beneficially entitled in possession to the said testator's real property, as a succession derived from my father, Richard Willock Rushton, otherwise Claridge, in the said information named, but I say I am not chargeable as alleged in the said information with duty in respect of my said succession at the rate of 10% per cent., inasmuch as my said succession is derived by immediate descent from my said father, who at the time of his death was seized in fee of the said property, and that I am only chargeable with duty at the rate of 1% per cent. upon the value of my said succession, and I say that I decline to pay succession duty at the

rate demanded in the said information, upon the ground that my said father is the predecessor from whom I derived my said succession, and that I am only chargeable with duty at the rate of 1*l.* per cent.

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*The Attorney General, The Solicitor General, Locke, and Hanson, for the Crown.*—It is admitted that there is a succession liable to duty, and the only question is who is the predecessor, the testator or the father of the defendant. That depends on the 2nd and 15th sections of the Succession Duty Act, 1853. The 2nd section creates two classes of taxable successions, viz., successions by disposition made at any time, which takes effect in possession upon the death of any person after the commencement of the Act, and successions by devolution upon the death of any person after the commencement of the Act. The 15th section deals with transmissions before the Act of successions under the Act which vest in persons who die before the succession takes effect in possession, and in that case the succession is to be taxed as if those persons were the successors. Therefore, as no succession by devolution arose upon the death of Richard Willock Rushton, because it took place before the passing of the Act, the defendant, his heir, is chargeable with the same duty as the ancestor would have paid if he had lived until the succession took effect in possession. The 2nd section bears upon the face of it a marked distinction between the two classes of successions. It first deals with successions created by disposition. “Every *past or future* disposition of property by reason whereof any person *has or shall* become beneficially entitled to any property, or the income thereof, upon the death of any person dying after the time appointed for the commencement of this Act, either immediately or after any interval, either certainly or contingently, and either originally or by way


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of substitutive limitation." In the second branch of the section the words "past or future" are omitted. "And every devolution by law of any beneficial interest in property, or the income thereof, upon the death of any person dying after the time appointed for the commencement of this Act, to any other person, in possession or expectancy, shall be deemed to have conferred or to confer on the person entitled by reason of any such disposition or devolution a succession." Therefore a *disposition*, whether past or future, confers a succession, provided the person who takes under it becomes beneficially entitled to the property upon the death of a person dying after the commencement of the Act. A *devolution* only confers a succession if the devolution takes place upon the death of a person dying after the commencement of the Act. The 2nd section, having defined the two kinds of successions, proceeds thus.—"And the term 'successor' shall denote the person so entitled, and the term 'predecessor' shall denote settlor, disponent, testator, obligor, ancestor, or other person from whom the interest of the successor is or shall be derived." In this case there could not, at the time of the commencement of the Act, be a succession *by devolution* in consequence of the descent, because there was not a devolution upon the death of a person dying *after the commencement* of the Act; but a person taking under a *disposition* an interest which was reversionary at the time of the commencement of the Act, and which after that time became vested in possession by the death of another person, is chargeable with duty. The 15th section is also divided into branches. First, "where at the time appointed for the commencement of this Act, any reversionary property expectant on death shall be vested by alienation or other derivative title" (words sufficient to include descent) in any person other than the person who shall have become originally entitled thereto

under any such disposition or devolution as is mentioned in the second section of this Act, then the person in whom such property shall be so vested shall be chargeable with duty in respect thereof as the successor, at the same time and at the same rate as the person so originally entitled would have been chargeable with if no such alienation had been made or derivative title created." In 1853, the time appointed for the commencement of the Act, this property was reversionary property expectant on the death of the testator's widow, and vested, not by alienation, but by other derivative title, that is, by descent, in the defendant, a person other than Richard Willock Rushton, the person originally entitled thereto under such a disposition as is mentioned in the second section of the Act, viz., the will of the settlor. Those conditions being fulfilled, the defendant, the person in whom the property is vested, became chargeable with duty on the death of the tenant for life, at the same rate as Richard Willock Rushton, the person originally entitled, would have been chargeable with if no such derivative title had been created. Then the only question is, at what rate would Richard Willock Rushton have been chargeable. Being a stranger in blood to the testator, he would be chargeable at the rate of 10l. per cent. The 15th section proceeds thus:—  
 "And where, after the time appointed for the commencement of this Act, any succession shall, before the successor shall have become entitled thereto, or to the income thereof, in possession have become vested by alienation, *or by any title not conferring a new succession*, in any other person, then the duty payable in respect thereof shall be paid at the same rate and time as the same would have been payable if no such alienation had been made or derivative title created." Where there is a disposition of property in reversion, a new succession may arise when it vests in possession, in which case the duty is to be paid according

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to the relation of the new successor to his immediate predecessor; but if there be a derivative title which does not confer a new succession, the duty is to be paid at the same rate as the original successor would have paid. Here there could be no succession upon the death of the defendant's father, within the second branch of the 2nd section, because he died before the commencement of the Act, and the case is clearly within the 15th section. [*Pigott*, B.—Suppose the defendant had taken the property under a will made by his father before the Succession Duty Act, would that have altered the case?] The devise would create a taxable succession, but the question would still remain whether, as the testator was liable to pay duty as well as the devisee, the 15th section does not prescribe the time and rate of duty chargeable. [*Martin*, B.—Might not a title by will be a title by “alienation”? If a man gave away his property by will, from his heir at law, would not that amount to an alienation?]

*Lush* and *Hensman* for the defendant.—The case is within the 2nd section, not the 15th. The principle of the Act is to tax the successor in proportion to the degree of relationship which subsisted between him and the person from whom he derived the estate. [*Pollock*, C. B.—The question is, who is to be deemed the predecessor? If the testator's widow had died before the commencement of the Act, the defendant's father would have taken the estate without any liability to duty, and the defendant, upon his succession, would have been chargeable at the rate of 12 per cent. If the defendant's father had survived the testator's widow, he must have paid duty at the rate of 10 per cent., and the question is whether under the 15th section, the defendant is not bound to pay the same rate of duty as his father would have paid.] The 2nd section says, that the term


predecessor shall denote the ancestor or other person from whom the interest of the successor is derived. Here the defendant derived his interest from his father; the interest so derived is a succession, and the father is predecessor. Suppose the estate descended from father to son through several generations, would each successor derive his title from the original testator? In the case of *Lord Saltoun v. The Advocate General* (a), Lord Campbell, C., held that where, the succession is by "disposition," the *settlor* is the "predecessor," and where by "devolution" the *last possessor* is the "predecessor." Lord Cranworth and Lord Chelmsford also expressed an opinion that where a person takes by descent his ancestor is the predecessor, and it is unimportant to consider from whom the title was originally derived by settlement or will. The 15th section has received a judicial construction, and the decisions upon it do not support the argument for the Crown. In *The Attorney General v. Gardner* (b), a testator who died before the Succession Duty Act came into operation, devised a reversion in respect of which he would not have been liable to succession duty if it had vested in possession in his lifetime after that period; and it was held that he thereby created a new succession which was not exempt from duty under the 15th section of that Act. There Bramwell, B., laid down that the property was not vested in the defendant by alienation or other derivative title within the 15th section, and that a title by will was not within those words. The language used by Martin, B., in delivering the judgment of the Court is also applicable to this case. [Martin, B.—Is not the distinction this?—In *The Attorney General v. Gardner*, it was as if the estates created by the settlement had become exhausted and extinct, so that the testator was owner of the fee simple not by virtue of any limitation in the settlement, but as of his own property, and

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(a) 3 Macq. 660, 673.

(b) 1 H. &amp; C. 639.

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the disposition by him was carved out of the original fee simple. That is not so in this case, the limitation by the testator stands, and the defendant takes by virtue of it. The 15th section plainly points out the intention of the legislature with respect to such a state of things.] In *Lord Braybrooke v. The Attorney General (a)*, Lord Wensleydale said: "The 15th section is meant to meet the simple case of a person having a right to a succession within the meaning of the Act, totally alienating that right to another person before the succession opens; or carving out a derivative interest from it, in which case the section provides that the assignee, or the person having the derivative title, shall stand on the same footing as the assignor." He then observes, that if there is a title conferring a *new succession*, the 15th section does not apply. [*Martin, B.*—No doubt, speaking in ordinary language, any one would say that the heir who succeeded to his father's property was the successor of his father; but this case is within the very words of the 15th section. *Pollock, C. B.*—If the defendant's father had lived at the present time, he would have been chargeable with duty at the rate of 10*l.* per cent.; then why is not the defendant to pay it?] It would be taxing the defendant, not upon his succession, but his father's. The words "alienation" "or other derivative title" in the 15th section, were not meant to include descent in law. The word "devolution," which occurs in the latter part of the section, would have been used to express such a title.

The *Attorney General* was not called upon to reply.

POLLOCK, C. B.—We are all of opinion that the defendant is chargeable with duty at the rate of 10*l.* per cent. Upon reading the 2nd and 15th sections the case is plain. An

(a) 9 H. L. 150, 178.

estate was devised for life with a remainder in fee, and the remainderman died before the Succession Duty Act came into operation; but the tenant for life lived until after that period. If the remainderman had died after the tenant for life he must have paid duty at the rate of 10% per cent., and the defendant who takes his estate by descent is chargeable under the 15th section, with duty at the same rate.

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MARTIN, B.—I also think this a clear case. It seems to me that a great deal of the argument for the defendant is founded upon an endeavour to divert the 2nd section from its real object. The object of that section is to give a definition of the three terms, “succession,” “successor,” and “predecessor.” This case falls within the 15th section. A testator devised an estate to A. for life, with remainder to B. in fee. B. died before the Succession Duty Act came into operation; but A. died after that period. By virtue of the devise the heir of B. became entitled to the property upon the death of his father. Then, at the time appointed for the commencement of the Act, did any reversionary property expectant on death vest in the defendant by alienation or other derivative title? He was not possessed of this property except as a reversionary property by virtue of a derivative title, that is to say, by descent. Then was he a person other than the person originally entitled thereto under such a disposition or devolution as is mentioned in the 2nd section. His father was the person originally entitled thereto under such a disposition as is mentioned in the 2nd section, viz., by will. Then the 15th section expressly says that the person in whom such property shall be vested shall be chargeable with duty at the same time and at the rate as the person originally entitled would have been chargeable.



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It seems to me that the case is clearly within the 15th section.

CHANNELL, B.—I am also of opinion that this case is within the 15th section of the Act. If that section be read apart from the 2nd section, I think there can be no reasonable doubt on the subject. I agree with my brother *Martin* that the 2nd section has been introduced into the argument for the purpose of diverting it from its proper object.

FIGOTT, B.—I think that there might have been some foundation for the argument, on the part of the defendant, if the last two lines of the 2nd section had stood alone; but when the 15th section is read it seems to me impossible to escape from the conclusion that this is the very case contemplated by that section. I think that the words “derivative title,” are apt words to express the state of this succession.

Decree accordingly.

Feb. 1.

HILBERY v. HATTON and Another.

If a principal ratifies the purchase by his agent of a chattel which the vendor had no right to sell, he is guilty of a conversion although at the time of the ratification he had no knowledge that the sale was unlawful.

TROVER for a brig and stores.

Pleas.—Not guilty, and not possessed.

At the trial, before *Bramwell*, B., at the London Sittings after last Michaelmas Term, the following facts appeared:—

Therefore, where the plaintiff's ship was stranded on the coast of Africa, and unlawfully taken possession of and sold by W. to T., the agent of the defendants, merchants at Liverpool, who, on being informed by their agent of the purchase and price, wrote in reply:—“We duly received your letter informing us of your having purchased the brig, but you do not say from whom you bought her, nor whether you have the register with her. *You had better, for the present, make a hulk of her.* From your description of her she is not out of the way in price if she has not sustained much damage.—*Held*, a ratification by the defendants of the tortious act of their agent, and sufficient evidence in trover of a conversion by them.

The plaintiff, a shipowner in London, was owner of the brig "John Brooks," which was chartered by a merchant at Liverpool to carry a cargo to the river Bonny in Africa. The brig arrived off the bar of that river on the 25th of November, 1862, when she got into shoal water by the breakers. The captain and crew left her and went on shore to procure assistance. A person named Ward, the consignee of the cargo, took possession of the brig and caused her to be brought up the river Bonny and surveyed; and without any authority whatever he put her up for sale by auction. The defendants were merchants at Liverpool, who traded to the coast of Africa. Their agent at the Bonny river was a person named Thompson, who was employed principally to buy palm oil in exchange for English goods. Thompson attended the sale, and on the 1st of January, 1863, bought the ship and cargo for the defendants for 330*l.* 12*s.* 6*d.*, although he had no authority from them to enter into contracts of that description. On the 5th of January Thompson wrote to the defendants as follows:—

"Messrs. Hatton & Cookson.

"Bonny,

"Gentlemen,

"Jan. 5, 1863.

"I have purchased the brig "John Brooks" for you at a very cheap rate. She has been ashore at Bonny Bar; built of English oak, thoroughly copper-fastened. She had new top-sides eighteen months ago, and newly metalled in March last. I shall have her down in a few days, and will give you full particulars per next mail, and shall act according to your instructions by return of mail. By looking through the above list you will find it a very cheap bargain.

"Please send nails and few sheds copper.

"Your obedient servant,


"P. Thompson."

At the top of the letter was a list of the sums he had

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paid for the ship and stores, making in the whole 330*l.* 12*s.* 6*d.*

The defendants received this letter at Liverpool on the 11th of February, and on the 24th they wrote in answer as follows:—

“ Captain Peter Thompson. “ Liverpool,
 “ Dear Sir, “ Feb. 24, 1863.

“ We duly received your letter of the 5th of January, informing us of your having purchased the brig ‘John Brooks,’ but you do not say from whom you bought her, nor whether you have the register with her. You had better for the present make a hulk of her, and send home the ‘Inverna’ during the summer months. From your description of her she is not out of the way in price, if she has not sustained much damage. What became of the cargo? Let us know all particulars, and who sold her, and about the register. We find she is registered in London.”

On the 13th of March the defendants received from Thompson a letter, dated the 5th of February, containing the following passages:—

“ I am happy to let you know that I have completed her, hove her down, and repaired all damages. She is now afloat, and I have let her to Captain McIntosh at 40*l.* per month, waiting further orders.”

On the 3rd of March the plaintiff sent the following telegram from London to the defendants at Liverpool:—

“As owner of the ‘John Brooks,’ I hereby give you notice not to accept or pay any bills drawn at Bonny on account of the purchase of the said vessel, the sale being illegal.”

Subsequently the plaintiff wrote to the defendants to the same effect. A bill drawn by Thompson upon the defendants, and given to Ward for the price of the ship, was presented to the defendants for acceptance, but they refused to

accept it, and wrote to Thompson requesting him not to do any further repairs to the brig.

It was submitted on behalf of the defendants that there was no evidence of a conversion. The learned Judge left it to the jury to say whether the defendants had ratified the act of Thompson in purchasing the ship, and he told them, that although the defendants did not know that the ship had been unlawfully sold, yet if they ratified the sale they would be liable.

The jury found a verdict for the plaintiff, expressing their opinion that the letter of the 24th of February was a ratification of the act of Thompson. The damages were referred by consent, and leave was reserved to the defendants to move to enter a nonsuit, if the Court should be of opinion that there was no evidence of a conversion.

Mellish, in the following Michaelmas Term, obtained a rule nisi accordingly; or for a new trial on the ground that it was a misdirection to tell the jury that, if the defendants ratified the act of Thompson in purchasing the ship, they were liable although they had no knowledge of the circumstances which made the sale illegal.

Vernon Lushington shewed cause (*a*) (Jan. 29).—First, there was evidence of a conversion by the defendants. Their agent purchased the ship under an illegal sale, took possession of it, and let it at a profit. The defendants never repudiated his acts, but by their letter of the 24th February expressly ratified the purchase of the ship.


The Court then called on

Cohen (with whom was *Mellish*), to support the rule.—

(*a*) Before *Pollock*, C. B., *Martin*, B., *Bramwell*, B., and *Channell*, B.

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There was no evidence against the defendants of a conversion. A ratification is not equivalent to a prior command unless made with full knowledge of all the circumstances. So long as the unconsciousness lasts there is no wrong; and no right of action arises where there is no wrong: Austin on Jurisprudence, vol. 2, p. 455. When the defendants wrote the letter of the 24th of February they had no knowledge that their agent had not purchased the ship at a lawful sale. A mere purchase of goods, in good faith, from one who had no right to sell them, is not a conversion of them, against the lawful owner, until his title has been made known and resisted: Greenleaf on Evidence, vol. 2, § 642, p. 695, 7th ed. Immediately the defendants had notice that the ship belonged to the plaintiff they directed their agent to do no more repairs, and refused to accept the bill drawn upon them for the price. No injury has been done to the ship, but its value has been increased by the defendants' purchase of it. In *Burroughes v. Bayne* (a) and *Pillot v. Wilkinson* (b) there was a demand and refusal to deliver up the chattel. Moreover, the sale is not void, but voidable only; and the plaintiff can maintain no action until he has elected to avoid it: *The Bonita* (c). Therefore a demand and refusal are necessary to constitute a conversion: *Nixon v. Jenkins* (d); *M'Combie v. Davies* (e); *Metcalfe v. Lumsden* (f). In *Featherstonhaugh v. Johnston* (g) the defendant sold the goods; and a sale alone amounts to a conversion. Here the defendants' agent was guilty of a conversion in letting the ship; but that was without the knowledge of the defendants. A person who ratifies a trespass committed on his behalf becomes a trespasser by

(a) 5 H. & N. 296.

(b) 2 H. & C. 72.

(c) V. Lush. 252.

(d) 2 H. Black. 135.

(e) 6 East, 538.

(f) 1 C. & K. 309.

(g) 8 Taunt. 237.

estoppel: *Bird v. Brown* (a). But the maxim, "Omnis rati habitio retrotrahitur et mandato priori æquiparatur," has never been applied so as to render a principal liable for a tortious act of his agent of which he had no knowledge. *Freeman v. Rosher* (b); *Lewis v. Read* (c); *Owings v. Hull* (d); *Copeland v. The Mercantile Insurance Company* (e); *Bell v. Cunningham* (f), and Parsons on Contracts, vol. 1, p. 47, note (u), are authorities that the ratification of an act of an agent, in order to bind the principal, must be made with full knowledge of all the material facts.

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Cur. adv. vult.

The judgment of the Court was now delivered by

MARTIN, B.—This is an action of trover, and the question is whether there was evidence to go to the jury against the defendants of a conversion. The facts were that a ship called "John Brooks" was on shore at the entrance to the river Bonny on the coast of Africa, and was abandoned by the master and crew. She was taken possession of by a Mr. Ward and brought into the river, and afterwards sold by auction by Mr. Ward to a Mr. Thompson and taken possession of by him. It was admitted by the learned counsel for the defendants that the sale was altogether unlawful and passed no property in the ship. The defendants were merchants in England, and Mr. Thompson was their agent at Bonny and bought the ship for them. He then wrote them a letter as follows:—(His lordship read the letter of the 5th of January, 1863 (g).)

Upon the 24th February the defendant answered this

(a) 4 Exch. 786.

(b) 13 Q. B. 780.


(c) 13 M. & W. 834.

(d) 9 Peters, 607, 629.

(e) 6 Pick. 198.

(f) 3 Peters, 69. 81.

(g) Ante, p. 823.

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letter as follows:—(His lordship read the letter of the 24th February, 1863 (*a*), putting stress on the words “you had better for the present make a hulk of her.”)

There are other letters to the same effect which it does not seem necessary particularly to mention.

There is no doubt that Mr. Ward was guilty of a conversion by the sale, and Mr. Thompson guilty of one by buying and taking possession of the ship; if so, the only question is, did the defendants adopt and ratify his act of buying and taking possession, and it seems to us that there was evidence to go to the jury that he did. Indeed, we think that the letter of the 24th February, in answer to that of Thompson of the 5th January, proves this adoption and ratification, and rendered them responsible for Mr. Thompson's acts. We understand the jury expressed themselves clearly of the same opinion, and we are of opinion there was evidence upon which they might act, which is the only matter we have to decide.

(*a*) Ante, p. 824.

Jan. 25. THE IPSTONES PARK IRON ORE COMPANY (LIMITED) v.
 GEORGE PATTINSON.

A deed under
 the 192nd
 section of the
 Bankruptcy

DECLARATION on a promissory note made by one
 Griffiths for payment to the defendant of 496*l.* 8*s.* 6*d.*

Act, 1861, does not operate as a statutable release of the debtor, pleadable in bar of an action by a creditor; and the debtor can only avail himself of it by application to the Court of Bankruptcy to stay the proceedings; or after certificate by application to the Court in which judgment has been obtained to stay execution.

Semble, that a deed by which a debtor assigns all his estate and effects to a trustee to be applied and administered for the benefit of his creditors in like manner as if he had been adjudged bankrupt, and which contains no release of the debtor, is a valid deed within the 192nd section of the Bankruptcy Act, 1861.

one month after date, and indorsed by the defendant to the plaintiff. There were also counts for goods sold, &c.

Plea.—That after the accruing of the alleged causes of action, and after the Bankruptcy Act, 1861, commenced and took effect, to wit, on the 27th day of February, 1862, an indenture was made in the words and figures following, that is to say:—"This deed made the 27th day of February, 1862, between George Pattinson (the defendant), of, &c., ironstone-master, of the one part, and Samuel Pattinson, of, &c., on behalf of and with the assent of the undersigned creditors of the said G. Pattinson, of the other part: Witnesseth, that the said G. Pattinson hereby conveys all his estate and effects to the said S. Pattinson absolutely, to be applied and administered for the benefit of the creditors of the said G. Pattinson in like manner as if the said G. Pattinson had been at the date hereof duly adjudged bankrupt. And the creditors of the said G. Pattinson assenting hereto, being fully satisfied that his estate will not realize more than 5s. in the pound, hereby agree to accept the sum of 5s. in the pound in discharge of their respective debts, to be paid within twelve months from the date hereof. And the said G. Pattinson doth hereby expressly declare that the whole of the debts owing by him, and upon which the said composition will be payable, do not exceed the sum of 2100*l*. In witness whereof the said parties to these presents have hereunto set their hands and seals the day and year first above written." (Executed by the defendant, the trustee and six creditors).—Averments: that the said deed has become and is valid, effectual and binding on all the creditors of the defendant, including the plaintiff, as if they were parties to and had actually executed the same; and that all the conditions mentioned in the Bankruptcy Act, 1861, in that behalf have been ob-

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served; and that a majority in number representing three-fourths in value of the creditors of the defendant whose debts respectively amount to 10% and upward have in writing approved of and assented to the said deed; and that the said trustee appointed by the said deed duly executed the same; and that the execution of the said deed by the defendant was attested by an attorney and solicitor; and that within twenty-eight days from the day of the execution of the said deed by the defendant the said deed was produced and left, having been first duly stamped, at the office of the Chief Registrar in Bankruptcy for the purpose of being registered; and together with the said deed there was delivered to the said Chief Registrar such affidavit as by the said Act is in that behalf required; and that the said deed before registration was duly stamped as by the statute is provided; and immediately on the execution thereof by the defendant possession of all the property comprised therein of which the defendant could give or order possession was given to the said trustee; and the said deed was within twenty-eight days after the execution thereof by the defendant duly registered in the Court of Bankruptcy; and the said deed on being so registered had a memorandum thereof written on the face of the said deed, stating the day and the hour of the day at which the same was brought into the office of the chief clerk for registration; and a certificate of filing and registration of the said deed under the hand of the Chief Registrar and seal of the Court of Bankruptcy has been duly granted to the defendant; and the plaintiff, before and when the said deed, was made was a creditor of the defendant in respect of the cause of action in the declaration mentioned, and has had due notice of the said deed and been requested to execute the same, and might and could have executed the same had he been so minded, and still may execute the same;

and the said deed is now in full force and effect; and all things on the defendant's part have been done and happened to render the said deed as binding on the plaintiff as if he had actually executed the same, and to release the defendant from the plaintiffs' action by force of the deed and of the statute in such case made. And the defendant has been and is by means of the premises released and discharged from this action.

Demurrer, and joinder therein.

Sir *George Honyman*, in support of the demurrer.—First, this is not a deed binding on the plaintiff under the 192nd section of the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134). The deed consists of two parts; first, an assignment of all the debtor's estate and effects to a trustee for the benefit of his creditors; secondly, a covenant by the *assenting creditors* to accept 5s. in the pound, provided it is paid within twelve months. That covenant does not bind the non-assenting creditors. Its language is confined to those creditors who sign the deed. In *Legg v. Cheesebrough* (a) the Court drew a distinction between a covenant applicable to the creditors in general, and a covenant in its nature merely personal to the individual creditors who chose to sign the deed.—Secondly, the deed contains no release and therefore is not pleadable in bar of the action, but only affords ground for application to the Court of Bankruptcy to stay the proceedings. In bankruptcy, proof of a debt cannot be pleaded in bar to an action for the same debt: *Harley v. Greenwood* (b). Nor will the Court in which the action is brought stay the proceedings: *Ransford v. Barry* (c). The deed itself, even if binding on the plaintiff, cannot operate as a release of his debt: *Tabor v. Edwards* (d); and the

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(a) 5 C. B., N. S. 741.

(b) 5 B. & Ald. 95.

(c) 7 Dow. P. C. 807.

(d) 4 C. B., N. S. 1.

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Bankruptcy Act, 1861, does not give it that effect. The extent of its operation under that Act is defined by the 197th section, which provides that "the debtor and creditors and trustees, parties to the deed, or who have assented thereto or are bound thereby, shall in all matters relating to the estate and effects of such debtor be subject to the jurisdiction of the Court of Bankruptcy, and shall respectively have the benefit of and be liable to all the provisions of this Act, in the same or like manner as if the debtor had been adjudged a bankrupt, and the creditors had proved, and the trustees had been appointed creditors' assignees under the bankruptcy." Then, by the 198th section, the debtor's property and person are protected from execution; and a certificate of the filing and registration of the deed is available to the debtor for all purposes as a protection in bankruptcy. But if the deed is pleadable in bar, the debtor would be in the same position as if the debt was released.

Morgan Lloyd, in support of the plea.—The deed is binding on the plaintiff in the same way as if he had executed it. It is a deed for the benefit of all the creditors, for the debtor assigns all his estate and effects for the benefit of his creditors in like manner as if he had been adjudged bankrupt. Therefore every creditor has a right to share in the property. Then, the deed being binding on the plaintiff, the question is what is its effect. By force of the Bankruptcy Act, 1861, it operates as a release of the debts. The requisites of the statute having been complied with, by the 192nd section the plaintiff is in the same position as if he had executed the deed and released his debt. The object was not merely to assign all the debtor's property for the benefit of his creditors, but to assign it in satisfaction of their debts. The debtor has no consideration for the deed unless

he is released from the debt. The deed is in this form in order to comply with the requisites of the Act. All the cases have proceeded on the assumption that a deed of this kind is pleadable in bar. In *Legg v. Cheesebrough* (a), the operation of the deed as a release was limited to creditors who signed it. [*Martin*, B.—Whatever operation the statute gives this deed, there is nothing in it to prevent a creditor suing the debtor until he obtains his certificate.] In *Lewis v. Jones* (b), *Holroyd*, J., said, that unless an agreement for a composition can be got rid of on the ground of fraud, it operates as an accord and satisfaction of the original debt. And in *Flockton v. Hall* (c), *Erle*, J., said: “I take the law to be, that an agreement may be accepted in satisfaction of an existing cause of action.” The 197th section merely provides for the manner in which the composition is to be carried into effect, and has no reference to the case of an action against the debtor. The plaintiff is in the same position as if he had proved his debt in bankruptcy; and proving a debt is an election not to proceed by action: 12 & 13 Vict. c. 106, s. 182. [*Martin*, B.—In *Harley v. Greenwood* (d), *Bailey*, J., said:—“If it be a bar at law, it must become so by the positive enactment of the statute.”] In the case of bankruptcy the certificate is pleadable in bar, and if this deed is not an answer to the action it is doubtful whether any deed framed on the Bankruptcy Act, 1861, can be pleaded in bar. The 200th section and Schedule (D.) of that Act shew that the legislature intended that a deed of this kind should operate as a statutable release of the debt.

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Sir *George Honyman* was not called upon to reply.

(a) 5 C. B., N. S. 741.

(b) 4 B. & C. 506.

(c) 14 Q. B. 380.

(d) 5 B. & Ald. 95, 101.

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POLLOCK, C. B.—I am of opinion that the plaintiffs are entitled to judgment. The deed in question does not in terms contain a release of the debt, but it is contended that it operates as a release, and taken with the proceedings alleged in the plea is a bar to the action. No doubt, if the plaintiffs had executed the deed, and it had contained a release, and all the requisites of the statute had been complied with, it might have been pleaded in bar; but I apprehend all that the statute intended to do was to place a debtor, who makes an arrangement with a certain portion of his creditors, in the same situation as he would have been under the old bankrupt law, that is, to protect him from being harassed by actions. The mode in which that was effected under the old bankrupt law was by the Court of Bankruptcy interfering, or by this Court giving effect to their certificate, if the bankrupt had obtained one; and it seems to me that the only remedy, where an arrangement of this kind has been made, is to apply to the Court of Bankruptcy to stay the proceedings. Mr. *Lloyd* seemed to consider that, unless the deed operated as a release or the debtor obtained his certificate, he would derive no benefit from the deed. I think, however, that if the debtor is in such a position that the Court of Bankruptcy would stay the proceedings that is sufficient, and that there is no occasion for a release or a certificate. Under the Insolvent Acts, (and it may be observed that the Bankruptcy Act, 1861, is an amalgamation of the law of bankruptcy and insolvency), an insolvent never obtained a final discharge. Although a debtor who has effected an arrangement with his creditors is entitled to protection, it appears to me with reference to the object of the Act, the language of it, and by analogy to proceedings under former Acts, that this deed is not pleadable in bar of the action, and that the plaintiffs are entitled to judgment.

MARTIN, B.—I am of the same opinion. This deed appears to me within the meaning of the Act and the intention of the legislature. If a person has a debt owing to him, he has a right to sue for it in a Court of law. If the debt be paid, that is a bar: if the debt be released, that is a bar. So if an act of parliament says that, under certain circumstances, no action shall be brought, and that the statute shall be a bar, it has that operation. In the two former cases the debt is extinguished; but, according to the judgment of *Bailey, J.*, in *Harley v. Greenwood (a)*, (with which I entirely agree), if in a case of this kind there is a bar by which the debt is extinguished, it must be by the positive enactment of the statute. Here the deed admits that the debt is due and owing; and the only effect of a judgment is that instead of being a debt on simple contract it becomes a debt of record enforceable by execution. The statute carefully avoids saying that it shall be a bar, but the 198th section provides for the protection of the debtor's property and person from execution, and points out the manner in which that protection shall be effected. Then what right have we to say that the statute is a bar to the action and an extinguishment of the debt? If we were so to hold, this inconvenience would follow, that, although the deed was never carried into effect, the debt would be altogether gone, for where there is a legal bar of a debt it is barred for ever. The operation of a judgment for the defendant would be to extinguish the debt. The real answer, however, is that the legislature has so framed the statute that it cannot have the operation contended for. So far as my experience goes, this is the only good deed I have seen. It has the operation the legislature intended.

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CHANKELL, B.—I am also of opinion that the plaintiffs are

(a) 5 B. & Ald. 95. 101.

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entitled to judgment. If it were necessary to decide whether this deed was inoperative, I should pause before I came to that conclusion. But that is not the question now before us. The question is whether this deed is a *bar to the action*, in other words, whether it can be pleaded as a statutable release. I think it cannot. I agree with my brother *Martin* that the deed is operative, but not in the way in which it has been relied on. It places the debtor in the same position as if there had been an adjudication of bankruptcy, appointment of assignees, and proof by the plaintiff of his debt. Taking those three circumstances as resulting from the deed, they do not render it pleadable in bar, or, in other words, a statutable release of the debt. The powers, rights, and remedies of the trustee and creditors with respect to the debtor and his estate and effects are the same as in bankruptcy; but in bankruptcy it would be no answer to an action by a creditor to plead that a fiat had issued, assignees had been appointed, and the creditor had proved his debt. That might warrant an application to the Court of Bankruptcy to stay the proceedings, or expunge the proof of the debt, but it would be no bar to the action. If the creditor obtained judgment, and before execution the bankrupt obtained his certificate, he might apply to the Court to prevent execution issuing. Looking at the remedy which this debtor has, I think that the deed is not only operative but has a most beneficial operation in this case, where there is no reason to suppose that the assenting creditors have acted otherwise than fairly. It has the beneficial effect of deterring creditors from harassing the debtor with actions; for the object of a creditor in suing is not merely to obtain judgment but to get the fruits of it, and he knows that if the proceedings under a deed of this kind are carried out, and the debtor obtains a certificate, the judgment is inoperative. It seems to me, therefore, that

this deed is not only operative but has a large and beneficial operation.

It has been said that, if this deed is not pleadable, it is doubtful whether any deed good under this Act can be pleaded in bar. Upon that point it is not necessary to express any opinion. I can, however, well understand that where certain creditors have executed a deed of this kind, and, in addition to a covenant not to sue, have agreed that if they do the deed may be pleaded as a release, it is pleadable in bar of the action. That question, however, is immaterial with reference to the circumstances of the present case.

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PIGOTT, B.—I agree with the rest of the Court, although, I own, with some little doubt in consequence of the form of deed given in Schedule (D) of the Act. I should have thought that the 192nd section contemplated a deed which would operate as a release. This deed does not contain a release, and in the result I have come to the same conclusion as the rest of the Court, that this deed is not pleadable in bar; for after the decision in *Harley v. Greenwood*, and the principle there laid down, it is remarkable, if the legislature meant to bar actions when a deed has been entered into by the requisite number of creditors (seeing how minutely they have described what shall follow the registration of such a deed), that they did not expressly say that it shall be a bar to any action. No doubt there is a seeming anomaly in leaving a debtor to be harassed with actions after he has assigned all his property to trustees for the benefit of his creditors. But I suppose the legislature thought that such actions would not be brought without good reason. Therefore, although not without some little doubt, I agree with the rest of the Court.

Judgment for the plaintiffs.

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The words, "mortgage, debt or sum of money," in the Stamp Act, 16 & 17 Vict. c. 59, s. 10, include contingent as well as absolute debts.

Therefore where C., being seized of an estate tail in certain property expectant upon the decease without issue male of N., and also upon the decease of S., executed a disentailing deed, and in consideration of 15,082*l.* mortgaged the property for 38,000*l.*, to be paid within three months after the decease of N. and S., provided N. died without

issue male, and C. afterwards sold the property (subject to the mortgage) to M. for 5250*l.*—*Held*, that ad valorem duty was chargeable in respect of the mortgage debt of 38,000*l.* as part of the consideration for the purchase, although it was only payable upon a contingent event which might never happen.

IN pursuance of the 13 & 14 Vict. c. 97, s. 15, the Commissioners of Inland Revenue stated the following case for the opinion of this Court:—

By an indenture bearing date the 22nd December, 1854, and made between Henry George Augustus Cowne of the first part, Thomas Pocock of the second part, Sir Robert John Harvey, George Percy Elliott and Thomas Godfrey Sambrooke, trustees of the General Reversionary and Investment Company (and hereinafter called "the said trustees"), of the third part: It was recited that by virtue of the will (a) of Elizabeth Nelthorpe, deceased, the said Henry G. A. Cowne was, immediately before the execution of the disentailing deed thereafter recited, seized of an estate tail in the hereditaments described in the first schedule thereunto annexed, expectant upon the decease without issue of James Tudor Nelthorpe, and also expectant upon the decease of Samuel Cowne: and also by virtue of other circumstances was also seized of an estate in tail in the premises thereafter mentioned in the second schedule thereto in like expectancy as aforesaid, and by reason of the said events and otherwise the said Henry


(a) In the course of the argument it was stated by counsel that the will was made in the

year 1794, and that James Tudor Nelthorpe was 66 or 70 years of age.

G. A. Cowne was at the same time entitled to an estate in tail male or quasi tail male in like reversion as aforesaid to 18,776*l.* 5*s.* 5*d.* three per cent. consols: Also reciting the deed of disentailing assurance before referred to, dated the 21st December, 1854: And reciting that the said Henry G. A. Cowne had applied to the said trustees and proposed to them that in consideration of the sum of 15,082*l.* 5*s.*, to be paid to him by the said trustees, he would secure by way of mortgage a contingent reversionary sum of 38,000*l.* to be paid to them within three months after the decease of the said James Tudor Nelthorpe and Samuel Cowne, provided the said James Tudor Nelthorpe died without issue male; and the said contingent reversionary sum, if it became payable, to carry interest at 5*l.* per cent. per annum from the decease of such survivor till the payment thereof: that the said trustees had agreed to advance the said sum of 15,082*l.* 5*s.* on the terms aforesaid, on having the said sum of 38,000*l.* and interest secured to them by the warrant of attorney of the said Henry G. A. Cowne and also by the now abstracting indenture. (The said warrant of attorney being recited accordingly). It was witnessed that in consideration of 15,082*l.* 5*s.* to the said Henry G. A. Cowne paid by the said trustees, and in exercise of the power given to him by the said disentailing assurance, he the said Henry G. A. Cowne did thereby irrevocably appoint that the premises in the said two schedules thereunto annexed should remain to the use of the said trustees, their heirs and assigns, for ever, subject to the limitations created by the said will antecedent to the estate of the said Henry G. A. Cowne under the same, and subject to the proviso for redemption thereafter contained. And it was further witnessed that, for the considerations aforesaid, the said Thomas Pocock, at the request and by the direction of the said Henry G. A. Cowne, did assign, and the said Henry G. A.

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Cowne did assign and confirm unto the said trustees the said sum of 18,776*l.* 5*s.* 5*d.* three per cent. consols, and all other monies assigned by the said disentailing assurance: To have, receive and take the said bank annuities, monies and premises unto the said trustees in as ample a manner as the said Henry G. A. Cowne could have taken the same in case the now indenture had not been made, but subject to the limitations before referred to, also the said proviso for redemption.


Proviso: that if the said Henry G. A. Cowne should within three months after the decease of the survivor of them the said James Tudor Nelthorpe and Samuel Cowne (provided the said James Tudor Nelthorpe should die without leaving male issue), pay to the said trustees the sum of 38,000*l.* with interest from the day of such decease without any deduction: then the said trustees should, at the request and cost of the said Henry G. A. Cowne, reconvey the aforesaid premises, and also reassign the said bank annuities unto the said Henry G. A. Cowne, or as he should direct, free from incumbrances.

Covenant for payment of the said 38,000*l.* by the said Henry G. A. Cowne. Power of sale, and usual covenants for title, &c.

By an indenture bearing date the 3rd of March, 1856, made between the said Henry G. A. Cowne of the first part, William Mortimore of the second part, and Thomas Head Mortimore of the third part: After reciting the recitals in the former deed and reciting the former deed: and reciting that the said Henry G. A. Cowne had contracted and agreed with the said William Mortimore for the sale to him of all the reversionary estate of him the said Henry G. A. Cowne in the hereditaments thereby intended to be conveyed, and in the said sum of stock, subject to the limitations contained in the will of the said Elizabeth Nelthorpe, and to the said

mortgage to the said General Reversionary and Investment Company of the 22nd December, 1854, in consideration of 5250*l.*: It was witnessed that in consideration of the said sum of 5250*l.* to the said Henry G. A. Cowne paid by the said William Mortimore (receipt, &c.), he the said Henry G. A. Cowne, in pursuance of a power contained in the said indenture of 21st December, 1854 (disentailing deed), and of any other power, &c., did direct and appoint, &c., unto the said William Mortimore and his heirs, all the premises, &c., contained in the said first and second schedules: To hold the same unto the said William Mortimore and his heirs (but subject to the several estates and limitations contained in the will of the said Elizabeth Nelthorpe antecedent to the estate of him the said Henry G. A. Cowne therein, and to the provisions of the said recited indenture of the 22nd December, 1854, and to the payment of 38,000*l.* and interest thereby secured: to such uses, and for such trusts, intents and purposes, &c., as the said William Mortimore by any deed, &c., should from time to time direct, limit and appoint: and in default thereof to the use of the said William Mortimore and his assigns during his life, without impeachment of waste. Remainder to the use of the said Thomas H. Mortimore, his executors, administrators, &c., during the life of the said William Mortimore: In trust for him the said William Mortimore and his assigns. Remainder to the use of the said William Mortimore, his heirs and assigns, for ever. (Declaration by said William Mortimore to bar dower.) And it was further witnessed that, for the consideration aforesaid, he, the said Henry G. A. Cowne, did assign, transfer and set over unto the said William Mortimore, his executors, &c., all that said sum of 18,776*l.* 5*s.* 5*d.* three per cent. consolidated bank annuities, then standing in the name of the Accountant General of the Court of Chancery, and all other sums of money, stocks, &c., comprised in the said deed of the 21st December,

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1854, and all the estate, &c. : To hold, receive and take the same unto the said William Mortimore, his executors, administrators and assigns, but subject to the several estates and limitations created by the said will of the said Elizabeth Nelthorpe, antecedent to the estate of the said Henry G. A. Cowne, to the said indenture of the 22nd of December, 1854, and the payment of the said sum of 38,000*l.* and interest, to and for his and their own use absolutely. Covenant by Henry G. A. Cowne that he had good right to release, assure and assign; freedom from incumbrance and for further assurance. Covenant by the said William Mortimore, that he, his executors, administrators or assigns, would pay the said 38,000*l.* and interest, and keep indemnified the said Henry G. A. Cowne, his representatives and property, from all actions, &c. Proviso, that the said William Mortimore, having paid the said 38,000*l.* and interest, should stand in the place of the trustees of the said Company, and, for protection against mesne charges, &c., should be entitled to treat the debt and interest as still on foot.


The said William Mortimore, by his solicitors, on the 16th day of October, 1862, presented to the Commissioners of Inland Revenue the said deed of the 3rd of March, 1856, stamped with the duty of 27*l.* 10*s.*, and with eight progressive duty stamps of 10*s.* each (the same deed containing therein eight entire quantities of 1080 words over and above the first quantity of 1080 words), and desired to have the opinion of the said Commissioners as to the stamp duty with which such deed was chargeable, and the said Commissioners being of opinion that the said deed was chargeable under the said act of parliament with the ad valorem duty of 216*l.* 10*s.* as a conveyance upon sale of property by the said Henry G. A. Cowne to the said William Mortimore, in consideration of 5250*l.*, subject to the mortgage of 38,000*l.*, they the said Commissioners assessed and charged the sum of 189*l.* as the further ad valorem duty to which


in their judgment the said deed was liable. Whereupon the said William Mortimore paid the sum of 189*l.* as and for such further stamp duty. But the said William Mortimore having declared himself dissatisfied with the determination of the said Commissioners, required them to state this case.

The question for the opinion of the Court is whether the said deed of the 3rd day of March, 1856, is chargeable with ad valorem conveyance duty in respect of the mortgage for 38,000*l.*, to which the property is subject.

Montague Smith (with whom was *Murray*) argued for the appellant (January 16th) (a).—The Commissioners have treated the mortgage for 38,000*l.* as part of the consideration for the purchase of the estate, and, adding it to the 5250*l.* actually paid, have assessed the duty on 43,250*l.* But the value of the estate was not 5250*l.* plus 38,000*l.*, but 5250*l.* plus the value of the contingent liability to pay 38,000*l.*, which, fifteen months before, was valued at 15,000*l.* By the 55 Geo. 3, c. 184, Schedule, part 1, "Conveyance," an ad valorem duty is imposed on the conveyance of any lands, tenements, &c. in respect of the principal or only deed, "where the purchase or consideration money therein or thereupon expressed shall not amount to" a certain sum. Then, amongst others, there is this explanatory paragraph:—"Where any lands or other property shall be sold and conveyed in consideration, wholly or in part, of any sum of money charged thereon by way of mortgage, wadset, or otherwise, and *then due and owing to the purchaser*; or shall be sold and conveyed subject to any mortgage, wadset, bond, or other debt, or to any gross or entire sum of money to be afterwards paid by the purchaser, such sum of money or debt shall be deemed the purchase or consideration money &c., as the case may be, in

(a) Before *Pollock*, C. B., *Martin*, B., *Channell*, B., and *Pigott*, B.

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respect whereof the said ad valorem duty is to be paid' [*Martin, B.*—These lands were sold and conveyed subject to a mortgage.] The transaction is not within the definition in the 55 Geo. 3, c. 184, Schedule, part 1, "Mortgage:—" "Mortgage, conditional surrender by way of mortgage, further charge, wadset and heritable bond; disposition, assignation or tack, in security; and eik to a reversion; of or affecting any lands, estate or property, real or personal, heritable or moveable whatsoever." And immediately before the imposition of the duty are the following words, which govern the preceding:—"Where the same respectively shall be made as a security for the payment of any definite and certain sum of money advanced or lent at the time, or previously due and owing, or forborne to be paid, being payable." That means a sum of money owing to the mortgagee and to be paid at all events by the mortgagor. This sum of 38,000*l.* is not "money advanced or lent at the time, or previously due and owing, or forborne to be paid, being payable." The Act also says: "And where the same respectively shall be made as a security for the repayment of money to be thereafter lent, advanced, or paid, or which may become due upon an account current." That means, thereafter lent, advanced, or paid by the mortgagee, and which is to be repaid by the mortgagor. But this sum of 38,000*l.* is at no future time to be lent, advanced, or paid by the mortgagee. Therefore the Commissioners were right in considering that the indenture of the 22nd December, 1854, was not a mortgage, and they stamped it under the 16 & 17 Vict. c. 59, Schedule, tit. "Policy of Assurance or Insurance." The words "subject to any mortgage," in the 55 Geo. 3, c. 184, Schedule, part 1, "Conveyance," mean absolutely subject to a mortgage properly so called for a definite sum of money which forms part of the consideration, not a mere contingent liability the value of which depends

on the nature of the risk. The greater the risk the larger would be the sum to be ultimately paid in consideration of the money advanced by the mortgagee; so that the greater the probability that the sum would never be paid, the higher would be the stamp duty. [*Pollock, C. B.*, referred to *Sanville v. The Commissioners of Inland Revenue (a)*.] There it was held that an assignment of a policy of insurance for 4000*l.* and of all monies to become payable thereunder, upon the trusts of a marriage settlement, was not liable to ad valorem duty under the 13 & 14 Vict. c. 97, Sched. "Settlement," as a deed whereby any *definite and certain* principal sum of money was settled.

The Attorney General (with whom was *The Solicitor General* and *Beavan*), for the respondents.—The question depends on the language of the 55 Geo. 3, c. 184, Schedule, part 1, "Conveyance," and therefore decisions upon the language of titles "Mortgage," "Settlement," or "Policy of Insurance," cannot affect the case. The term "ad valorem" does not mean "according to the actual value of the consideration," but according to the value as ascertained by the rules prescribed by the Act. If the argument be right, that "ad valorem duty" means a duty to be imposed according to the *real value* of the consideration at the time of the transaction, the fact of there being a future or reversionary payment would materially affect the duty. Suppose this sum of 38,000*l.* was to be paid fifty years hence, or upon the decease of A. B. and C., persons in good health and young, it is evident that its market value would be considerably less than 38,000*l.* The consideration for this mortgage debt of 38,000*l.* was fixed at 15,082*l.*, not on account of the supposed risk or contingency of issue male, but because there were two lives upon the failure of which


(a) 10 Exch. 159.

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the payment was to be made. The fact of its being a postponed or reversionary payment depending on lives would render its market value at the time of the transaction less than the sum to be paid at the future period. But the legislature says that the element of value is not to be taken into account. Words, not found in other clauses, have been inserted for the express purpose of excluding it, viz., "or to any gross or entire sum of money to be *afterwards paid* by the purchaser" (a). That would include money payable in six months, two or three years, or at any distant period. It might not have been unreasonable to charge ad valorem duty only on the amount of the consideration actually paid, and if, upon some future event, a further sum became payable to increase the amount of duty, as in the case of probate. But the legislature has thought fit to impose the duty on the sum ultimately payable, without regard to any question of rebate, discount or valuation. The case does not turn on the words "then due and owing to the purchaser" (a). The paragraph (a) proceeds, "or shall be sold and conveyed subject to any mortgage, wadset, bond or other debt, or to any gross or entire sum of money to be afterwards paid by the purchaser." The words "to any gross or entire sum of money to be afterwards paid by the purchaser," being distinguished from the word "debt," are applicable to that which in law is not a debt, and the words "to be afterwards paid by the purchaser" include a sum agreed to be paid at a future period, although, upon the happening of some contingent event, the purchaser may be relieved from the payment. There is no special definition of the word "mortgage" in the 55 Geo. 3, c. 184, Schedule, part 1, "Mortgage," and it has its natural meaning. The paragraph relied on merely imposes a duty on mortgages of a particular description, viz., "where the same respectively

(a) 55 Geo. 3, c. 184, Schedule, part 1, "Conveyance."

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shall be made as a security for the payment of any definite and certain sum of money advanced or lent at the time, or previously due and owing, or forborne to be paid, being payable." Unless the mortgage is a security for something in the nature of a loan, it is not chargeable with duty under that head; but the provision does not affect the meaning of the word "mortgage." A mortgage is a security upon land for payment of money payable either absolutely or contingently. [*Martin*, B.—The question is, whether the words "to be afterwards paid by the purchaser" (a) mean "to be afterwards paid by the purchaser upon a contingency."] The case of *Sanville v. The Commissioners of Inland Revenue* (b) arose under the title "Settlement," in the schedule of the 13 & 14 Vict. c. 97. There the language is, "Any deed, &c., whereby any *definite and certain* principal sum or sums of money" shall be settled; and it could never be said that the settlement of a mere contract, not to pay a sum of money absolutely, but upon the performance of a variety of conditions, which might or might not be performed, was the settlement of a "definite and certain principal sum of money." Under the title "Conveyance" are the words "any gross or entire sum of money," which can have no reference to the certainty of payment, but relate only to the character of the sum. The words "to be afterwards paid" are large enough to include any sum payable, although upon a contingency. Suppose the event happened upon which the money became payable, would there not be a sale of lands "subject to a mortgage to secure a gross or entire sum of money to be afterwards paid by the purchaser"? Upon the face of the deed, it appears that the parties regarded the contingency as merely nominal, and considered

(a) 55 Geo. 3, c. 184, Schedule, part 1, "Conveyance."

(b) 10 Exch. 159.

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that the mortgage money must be paid when the two lives dropped.

Montague Smith replied.

Cur. adv. vult.

On a subsequent day (Jan. 23) the Court expressed their wish to hear a further argument as to whether a contingent mortgage in the nature of a wager was within the meaning of the Act.

Montague Smith argued for the appellant (Jan. 30.)—This case is not within the 55 Geo. 3, c. 184, Schedule, part 1, “Mortgage.” [*Martin, B.*—Does not the question depend on the 16 & 17 Vict. c. 59, s. 10?] That enactment, which was passed in consequence of the decision of this Court in the case of *The Marquess of Chandos v. The Commissioners of Inland Revenue* (a), has no reference to a contingent mortgage. It merely provides that, where land is sold subject to a mortgage or debt or sum of money, such sum or debt shall be deemed the consideration in respect of which ad valorem duty is payable notwithstanding the purchaser is not liable to pay it: sect. 10. If in this case the money had been payable on the death of the two tenants for life, it might have presented a different aspect; but it is not payable except upon a contingency more or less remote in proportion to the probability of one of them dying without issue male. The case is not within the language or the spirit of the 55 Geo. 3, c. 184, Schedule, part 1, “Conveyance.” The sum of 38,000*l.* was not the “purchase or consideration money,” but the 5250*l.* This is

(a) 6 Exch. 464.

not the case of land "sold and conveyed in consideration wholly or in part of any sum of money charged thereon by way of mortgage, and then due and owing to the purchaser." That contemplates a sale; and even if this land had been sold to the Reversionary Interest Society, how could it be said that the 38,000*l.* was then due and owing to the purchaser? Assuming that a debitum in præsentî, solvendum in futuro, would be within those words, a debt not absolutely payable on a future day, but upon a contingency depending on a variety of circumstances, and which may never arise, clearly is not. [*Martin*, B.—This is a contingent liability to pay a certain sum: that is a contingent debt. *Pollock*, C. B.—The difficulty I felt is this: a contingent debt is in reality no debt but merely an obligation or promise which in a certain event will become a debt. It could not be proved in bankruptcy until an act of parliament passed enabling the Commissioners to value it.] The words in the old bankrupt Acts were "debt or demand." A debt payable at a future time was within those words, but a contingent debt was not. [*Martin*, B.—The 56th section of the 6 Geo. 4, c. 16, says, that if any bankrupt shall have contracted "any debt payable upon a contingency."] In *Hinton v. Acraman* (a) there was a debt on bond, but as it was defeasible upon an event which might never happen it was held not proveable, under the 56th section of the 6 Geo. 4, c. 16, as a debt payable on a contingency. There a distinction was taken between contingent liabilities which may never become debts, and debts payable on a contingency. The judgment of *Tindal*, C. J., in that case supports the view contended for. *Hankin v. Bennett* (b) and *Ex parte Tindal* (c) are also authorities that in this case there never was a contingent debt, but

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(b) 8 Exch. 107.

(c) 8 Bing. 402.

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only a contingent liability. In fact the transaction is a mere wager.—He also referred to *Sanville v. The Commissioners of Inland Revenue* (a).

The Attorney General (with whom were *The Solicitor General* and *Beavan*), for the respondents.—If this sum of 38,000*l.* had been absolutely payable on the death of the two tenants for life, however much their age, or health, or other circumstances might affect the value of the reversion, there could be no rebate of ad valorem duty on that account. Then does it make any difference that there is also a contingency? In the 55 Geo. 3, c. 184, Schedule, tit. “Conveyance,” the words “due and owing” must be taken in connection with the words “charged thereon by way of mortgage, wadset, or otherwise.” Then follows—“or shall be sold and conveyed subject to *any mortgage*, wadset, bond, or other debt, or to any gross or entire sum of money.” In the 16 & 17 Vict. c. 59, s. 10, the words “to be afterwards paid by the purchaser” are omitted. Therefore it is plain that a debt for which an action may be brought, or which is proveable in bankruptcy, is not alone contemplated, but any species of debt due according to the nature of the charge, whether absolute or contingent. [*Pollock*, C. B.—Is not the transaction a wager?] It is an alienation of an estate subject to a mortgage debt payable on a contingency. The ad valorem duty is imposed on the purchase or consideration money, but the argument on the other side strikes out three-fourths of the consideration. Suppose this estate had been charged by will with 38,000*l.* to be paid after the death of two successive tenants for life; that would have been part of the consideration, although it would not have been a debt due and owing from any person. Can it be said that the law does not admit the application of the

(a) 10 Exch. 159.

word "debt" to a sum payable on a contingency, when the legislature has used the language "debts payable on a contingency"? The authorities referred to have no bearing on this case. *Hinton v. Acraman* (a) was the case of a bond, to secure, not a definite sum of money payable on a contingency, but an uncertain and unliquidated liability which could not be the subject of valuation until the contingency happened. *Hankin v. Bennett* (b) was a similar case. In *Ex parte Tindal* (c) there were two contingencies; one as to the distance of time at which the debt would be payable, depending on the life of the bankrupt, and another whether the wife or any of the children would be alive at the death of the bankrupt so as to obtain the benefit of the debt; but it was held that the uncertainty as to whether the debt would ever be payable afforded no reason why it should not be a contingent debt within the meaning of the Bankrupt Act. [Pollock, C. B.—If the event is one that must happen at some time, for instance, upon the death of A. B. and C., it is not the debt that is contingent, but the time of payment. Here the contingency does not relate to the payment of a debt, but the existence of a debt at all.] In *Ex parte Tindal*, the contingency as to who should have the benefit of the debt would never happen if the wife was dead and there were no children at the death of the bankrupt. The judgment of Lord Cottenham in *Davies v. Cooper* (d) is an authority that this mortgage may be treated as a reversionary charge payable upon the death of the two tenants for life.

Montague Smith, in reply.—The question is what is the substance of the transaction. The deed cannot be stamped as a mortgage for 38,000*l.*, because the duty

(a) 2 C. B. 367.

(c) 8 Bing. 402.

(b) 8 Exch. 107.

(d) 5 Myl. & C. 270, 273.

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on a mortgage is to be paid where it is "a security for a definite and certain sum of money advanced or lent, or previously due and owing, or forborne to be paid, being payable." [*Pollock, C. B.*—The indenture of the 22nd December, 1854, uses the words "secure by way of mortgage." Therefore, supposing the word "debt" in the Act means a debt of any sort whatever, and "mortgage debt" means any kind of mortgage security, this mortgage is within the Act.] The estate is pledged in the same way as if a horse was handed over to secure a sum of money which might or might not become payable if the horse won or lost a race. This mortgage would not be proveable as a "debt or demand" or "a debt payable in futuro;" but only under an Act which created a mode of proof for contingent liabilities, which were not debts at common law.

Cur. adv. vult.


The judgment of the Court was delivered, in the following Trinity Term (June 13), by

MARTIN, B.—This is a special case for the opinion of the Court, under the statute 13 & 14 Vict. c. 97, and the question is whether a deed of the 3rd March, 1856, is chargeable with ad valorem duty in respect of a mortgage for 38,000*l.* to which the property is subject. Mr. Cowne had been seized, under the will of Elizabeth Nelthorpe, of an *estate tail in certain property expectant* upon the *decease* without *issue* male of *James Tudor Nelthorpe*, and also upon the *decease of Samuel Cowne*. He executed a disentailing deed and entered into a transaction with a reversionary Company, which was carried out by a deed of the 22nd December, 1854. This transaction was a present payment to him of 15,082*l.* 5*s.*, and a mortgage by him of the property above

mentioned for 38,000*l.*, to be paid within three months after the decease of James Tudor Nelthorpe and Samuel Cowne, provided the former died without issue male. He afterwards sold his interest in the property subject to the above mortgage to Mr. Mortimore for 5250*l.* The conveyance of it was effected by the indenture of the 3rd March, 1856, and the question is whether this deed is chargeable with ad valorem duty in respect of the mortgage debt. This depends upon the construction of the 10th section of the 16 & 17 Vict. c. 59. The section begins by reciting a part of the schedule, title "Conveyance," of the General Stamp Act, 55 Geo. 3, c. 184, which provides that where property is sold and is conveyed subject to a debt or sum of money to be afterwards paid by the purchaser the same shall be deemed to be purchase money, in respect whereof ad valorem duty is to be paid. It then (no doubt in consequence of the case of *The Marquess of Chandos v. Commissioners of Inland Revenue* (a)) recites that it had been decided that ad valorem duty was payable in respect of such debt or sum only when the purchaser is bound to pay the same or to indemnify the vendor against it. And it enacts that when lands shall be sold, *subject to any mortgage or debt or sum of money, such sum or debt shall be deemed the purchase or consideration money, or part of the purchase or consideration money, as the case may be, in respect whereof ad valorem duty shall be paid, notwithstanding the purchaser shall not be liable to pay it or indemnify the vendor against it.* The scope and object of the enactment is clear, viz., that upon every purchase ad valorem duty shall be paid on the entire consideration which either directly or indirectly represents the value of the free and unincumbered corpus of the subject-matter of sale; and the real question in this case is whether the debt payable to the insurance Company, which

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as well the parties to the conveyance as the parties to this case themselves call a mortgage, is not a debt within the enacting part of the section. The argument on behalf of the appellant is, that it is a debt which may not become payable at all in the event of James Tudor Nelthorpe dying leaving issue male, or, in other words, that it is a contingent debt, and one which would not become payable if a certain event happened. The term contingent debt, or debt payable upon a contingency, has been long in common use. In the Bankrupt Act, 6 Geo. 4, c. 16, contingent debts upon which a value can be set are made the subject of proof, and we think that the words of the enactment, *any mortgage or other debt*, include contingent debts as well as absolute ones, and that there is nothing in it, or in the arguments which have been addressed to us on behalf of the appellant, to justify our excepting from the operation of the enactment debts which might be defeated by a contingency happening. The words are general, and we think we are bound to give them a general application. We do not rely upon the circumstance that, looking at the dates, and what of necessity must be the age of James Tudor Nelthorpe (*a*), there can exist no doubt but that the debt is practically an absolute one, and that the contingency which would render it not payable will never arise. We found our judgment upon the meaning of the words in the act of parliament applying to them the ordinary rule of construction.

It was said by the learned counsel for the appellant that the transaction between the insurance Company and Mr. Cowne was a wager. It is not a wager in the ordinary sense of that word, and we think the parties themselves put the true name upon it by calling it a mortgage, although it might not become payable if a certain event happened.

Judgment for the Crown.

(*a*) See note, *ante*, p. 838.

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Respondents.

PURSUANT to the 13 & 14 Vict. c. 97, the Commissioners of Inland Revenue stated the following case for the opinion of this Court:—

By deed poll, dated 4th August, 1863, under the seals of the Ulverstone and Lancaster Railway Company (hereinafter called the Ulverstone Company) and the Furness Railway Company (hereinafter called the Furness Company).

Reciting, first, that by the Ulverstone and Lancaster Railway Act, 1851 (thereinafter called the Act of 1851), the Ulverstone Company were incorporated with a capital of 220,000*l.* in shares), and were authorized to borrow on mortgage or bond not exceeding one third of their capital, and were authorized to make and maintain the Ulverstone and Lancaster Railway.

And reciting, secondly, that by “the Ulverstone and Lancaster Railway Act, 1858” (hereinafter called the Act of 1858), the Ulverstone Company were authorized to raise an additional capital of 150,000*l.* by shares, and to borrow on mortgage or bond further sums not exceeding 50,000*l.*; and by that Act it was, *inter alia*, enacted as follows:—

Section 42.—That the Ulverstone Company and the Furness Company, with the sanction of their shareholders, as therein mentioned, might enter into and carry into effect any agreement for the selling and transferring to the Furness

Under the powers of an act of parliament a railway Company sold and transferred their railway and works to another railway Company, and, in consideration thereof, the latter agreed to create and deliver to the shareholders of the former Company preferential shares of the nominal amount of 298,000*l.* bearing 6*l.* per cent. interest, and to take upon themselves a debenture debt of 98,687*l.*, and simple contract debts of that Company to the amount of 40,032*l.*—

Held: First, that the preferential shares were “stock” within the meaning

of the 13 & 14 Vict. c. 97, Schedule, tit. “Conveyance.”

Secondly, that the liability to pay the debenture and simple contract debts was part of “the consideration money” within that Act.

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Company of all or any part of or any share or interest in the railway works, lands, property and effects then vested in or belonging to the Ulverstone Company, or which they were, under the Act of 1851, authorized to make, maintain and reclaim, together with all or any of the rights, powers, privileges and authorities of the Ulverstone Company with respect to the same; and for the making of the sale upon such terms and conditions, and for such considerations as the two Companies mutually agreed on, but if any such sale comprised the railway of the Ulverstone Company it should comprise the whole thereof.

Section 43.—That the Ulverstone Company might make, and the Furness Company might accept, a sale according to the terms and conditions of, and for the purpose of carrying out any agreement in that behalf entered into between the two Companies under the reciting Act.

Section 44.—That the Furness Company might by any such agreement under the reciting Act agree to make to the Ulverstone Company, in consideration of the benefit thereby secured to the Furness Company, and the Ulverstone Company might accept such compensation as the two Companies mutually agreed on by way of immediate or future payment of any fixed, contingent, or other sum of money, or by way of allotment of any preferential or ordinary shares, or by way of immediate, future, fixed or contingent adoption, guarantee, or satisfaction by the Furness Company of all or any part of the debenture debt of the Ulverstone Company, or by any one or more of those ways, or by securing any other benefit to the Ulverstone Company, and either with or without any compensation in any one or more of those ways.

Section 48.—That according to the terms and conditions of any agreement in that behalf entered into between the Ulverstone Company and the Furness Company under the

reciting Act all the premises thereby agreed to be transferred by the Ulverstone Company to the Furness Company, and the rights, powers, privileges and authorities to be according to the reciting Act exercised and enjoyed by the Furness Company with respect to the same should, at the time by the agreement appointed for the transfer taking effect, be, by virtue of the reciting Act, and subject to the provisions thereof transferred to, and vested in the Furness Company absolutely and for ever, and be amalgamated with and deemed part of the original undertaking of the Furness Company.

Section 49.—Provided always, that the transfer should be evidenced sufficiently and conclusively by a deed of transfer duly stamped, and wherein the full consideration for the deed of transfer should be fully and truly set forth.

Section 50.—That from and after the transfer the Furness Company should, according to the extent of the transfer, subject to the provisions of the reciting Act, be subject to and perform, conform and be liable to all contracts, agreements, duties, obligations, debts, charges, claims and demands whatsoever, with respect to the premises transferred, to which the Ulverstone Company, if the transfer had not happened, would be subject or liable, and should indemnify the Ulverstone Company and their shareholders, directors, officers and servants from the same, and all costs, charges and expenses with respect to the same.

Section 53.—That the Furness Company from time to time, for the purposes of any transfer, under the reciting Act, to them of all or any part of the undertaking, property and effects of the Ulverstone Company, might raise, by the creation of new shares or stock, all such sums as were requisite, and might apply the money so raised accordingly, and should not apply for any other purpose any money so raised.

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And reciting, thirdly, that by articles of agreement, dated the 26th day of May, 1862, between the Ulverstone Company of the one part, and the Furness Company of the other part, wherein were recitals to the effect of the statements thereinbefore contained, and wherein it was also recited that the Ulverstone Company had issued shares of their capital to the aggregate nominal amount of 298,000*l.*, and the whole of those shares were fully paid up and registered in their books in the names of the holders thereof. And also reciting that the Ulverstone Company had borrowed on mortgage or bond the aggregate sum of 98,687*l.*, and the whole thereof, with the interest thereon, was secured by mortgages or bonds granted by them. And also reciting that the Ulverstone Company were indebted to the further amount of 40,032*l.* 4*s.* 2*d.*, the particulars whereof were specified in the schedule thereunder written, and (without their guaranteeing that they were not indebted to any further amount) they thereby declared that after taking diligent means to ascertain the total amount of their debts they were not aware that they were indebted to any amount exceeding 138,719*l.* 4*s.* 2*d.* (being the aggregate of their mortgage or bond debt of 98,687*l.* and their scheduled debt of 40,032*l.* 4*s.* 2*d.*), save only that the interest from the 15th day of March, 1862, then current on their mortgage or bond debt, was unpaid, and that the several matters in that schedule mentioned as unascertained were unpaid. And also reciting that the Ulverstone Company had made the Ulverstone and Lancaster Railway and it was open and used for public traffic. And also reciting (inter alia) that the two Companies, parties thereto, being desirous that the whole of the undertaking, property and effects of the Ulverstone Company should be transferred to the Furness Company, the Ulverstone Company, with the sanction of the respective shareholders given as therein

mentioned, had determined to enter into and execute those presents by way of agreement as thereafter appearing. Therefore those presents witnessed that for the considerations therein appearing it was mutually agreed by and between the Ulverstone Company and the Furness Company as follows, that is to say (inter alia).

Article 1.—The whole undertaking of the Ulverstone Company, and the whole of their railway, with the sidings, stations, buildings, works and conveniences whatsoever connected therewith, and the whole of their lands and other their property and effects whatsoever and wheresoever (thereinafter referred to as the transferred premises), should, in accordance with the terms and conditions of the reciting agreement, be, by virtue of the Act 1858, and subject to the provisions thereof, transferred to and vested in the Furness Company absolutely and for ever, and be amalgamated with and deemed part of their original undertaking. And the Ulverstone Company, in consideration of the agreement on the part of the Furness Company entered into by those presents, did thereby sell to them the transferred premises, and the Furness Company did thereby purchase the same from the Ulverstone Company accordingly.

Article 4.—The transferred premises should be vested in the Furness Company subject to all the debts and all other the liabilities and engagements of the Ulverstone Company, and the Furness Company would accordingly pay, satisfy or discharge all those debts, liabilities and engagements, and fully and freely indemnify and save harmless the Ulverstone Company, and their directors and shareholders, from and against the same and all claims and demands in respect thereof.

Article 7.—The Furness Company should be entitled, as from the 1st day of July, 1861, inclusive, to all the tolls,

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fares, rates, charges, rents, issues and profits whatsoever of the Ulverstone Company properly carried to the account of capital and of revenue respectively, and should be liable, as from that day inclusive, to all the outgoings and liabilities whatsoever of the Ulverstone Company properly chargeable against capital and against revenue respectively, and the accounts between the two Companies for the purpose of those presents should be made out and settled on that footing.

Article 12.—For the purposes of those presents the Furness Company would duly create the preferential stock to be allotted as thereafter provided to the shareholders of the Ulverstone Company.

Article 13.—In consideration of the benefit secured by the reciting agreement to the Furness Company they would, on, or as early as they could before the 1st day of January, 1864, allot to the shareholders of the Ulverstone Company, in rateable proportion to their respective shares of the Ulverstone Company's capital of 298,000*l.*, preferential stock of the Furness Company of the aggregate nominal amount of 298,000*l.*

Article 14.—The preferential stock to be so allotted should be deemed fully paid up stock, and should bear a perpetual preference dividend at the rate of 6*l.* per cent. per annum on the nominal amount thereof, and subject to the priority (so long as that priority existed) of stock or shares of the Coniston Company's capital to the nominal amount of 10,000*l.*, and bearing preferential dividends at the rate of 2*l.* 10*s.* per cent. per annum, guaranteed by the Furness Company, should rank in all respects on an equality with the then existing preferential shares of the Furness Company's capital of the nominal amount of 170,000*l.*, and bearing preferential dividends at the rate of 5*l.* per cent. per annum, or with any preferential shares

or preferential stock of the Furness Company thereafter substituted for those preferential shares, or any of them, save and except that the preferential stock to be allotted under this agreement should not be redeemable.

Article 21.—On Articles 12 to 20 (*a*), both inclusive respectively, being duly performed by the Furness Company, the Ulverstone Company's capital of 298,000*l.* and the shares thereof, should be extinguished, and the Furness Company's preferential stock of 298,000*l.* to be allotted in respect thereof should be deemed to be substituted for the same.

Article 22.—The transfer to the Furness Company of the transferred premises should take effect under the Act of 1858 on and from the day on which Articles 12 to 20, both inclusive respectively, were duly performed by the Furness Company, but as between the two Companies, and except only as was otherwise provided by those presents, their respective rights and liabilities under those presents should be the same as if the transfer had taken effect on and from the 1st day of July, 1861.

Article 26.—The Furness Company would bear and pay all the costs, charges and expenses on both sides, of and incident to the preparation, execution and carrying into full effect of those presents.

Article 27.—Those presents should be submitted to the Board of Trade for their approval, in accordance with the Act of 1858.

And reciting fourthly, that the following is a copy of the schedule to those articles of agreement.—(It specified 98,687*l.* debenture debts, and 40,032*l.* 4*s.* 2*d.* simple contract debts).

And reciting fifthly, that the said articles of agreement were submitted to the Board of Trade for their approval,

(*a*) These articles related to the assignment of substituted stock.

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and were approved by them pursuant to the Act of 1858, as appeared by a memorandum indorsed thereon, and dated the 3rd day of June, 1862, and signed by one of the joint secretaries to the Board of Trade.

And reciting seventhly, that in pursuance of the above stated articles of agreement preferential stock of the Furness Company of the aggregate nominal amount of 298,000*l*. had been created and duly allotted to the shareholders of the Ulverstone Company, and certificates thereof have been duly made out, delivered and distributed.

Eighthly.—That the two Companies respectively have duly performed and observed, up to the day of the date of the deed now being abstracted, their respective parts of the above stated agreement.

Ninthly.—That articles 12 to 20, both inclusive, of the above stated agreement, have been duly performed by the Furness Company.

Tenthly.—That, in consideration of the agreement on the part of the Furness Company entered into by the above stated articles of agreement, the whole undertaking of the Ulverstone Company and the whole of their railway, with the sidings, stations, buildings, works and conveniences whatsoever connected therewith, and the whole of their lands and other their property and effects whatsoever and wheresoever (with an exception immaterial), subject as to the transferred premises generally to the debts, liabilities and engagements of the Ulverstone Company, as expressed in article 4 of the above stated articles of agreement), had been, by virtue of the Ulverstone and Lancaster Railway Act, 1858, and subject to the provisions thereof, transferred to and vested in the Furness Company absolutely and for ever, and amalgamated with and made part of the original undertaking of the Furness Company.

And, lastly, that the deed of transfer now being ab-


stracted was made and executed in consideration of the proviso which forms section 49 of the Ulverstone and Lancaster Railway Act, 1858.

The said Furness Railway Company, by their solicitors, on the 8th day of August, 1863, presented to the Commissioners of Inland Revenue, at their office, the said deed of the 4th August, 1863, stamped with the duty of 35*s.*, and with four progressive duty stamps of 10*s.* each (the said deed containing therein four entire quantities of 1080 words over and above the first quantity of 1080 words), and desired to have the opinion of the said Commissioners as to the stamp duty with which such deed in their judgment was chargeable, and the said Commissioners being of opinion that the said deed was chargeable with the ad valorem duty of 2645*l.* 10*s.* as a "conveyance upon the sale of property" by the said Ulverstone and Lancaster Railway Company to the said Furness Railway Company for the following consideration, viz., 298,000*l.*, preference stock of the said Furness Railway Company, which, at the price of 131*l.* for every 100*l.* of the said stock, being the average selling price thereof on the day of the date of the said deed (and which fact is not disputed), amounts to the sum of 390,380*l.*, and also of the payment by the said Company of the debenture debt of the said Ulverstone and Lancaster Railway Company, amounting to 98,687*l.*, and of the debts set forth in the schedule to the said deed, amounting to 40,032*l.* 4*s.* 2*d.*, making the whole consideration to be paid by the Furness Railway Company for the said conveyance to them by the Ulverstone and Lancaster Railway Company 529,099*l.* 4*s.* 2*d.*, they the said Commissioners assessed and charged the stamp duty to which, in their judgment, such deed was liable at the sum of 2645*l.* 10*s.*

Whereupon the said Furness Railway Company paid to the Receiver General of Inland Revenue the sum of

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2643*l.* 15*s.*, being such a sum as, together with 1*l.* 15*s.*, the stamp duty already paid on the said deed, is equal to the duty so assessed and charged; and the said deed was thereupon stamped with stamps denoting the said further duty of 2643*l.* 15*s.*, so assessed as aforesaid.

The question for the opinion of the Court is, whether the said deed of the 4th day of August, 1863, is chargeable with ad valorem conveyance duty in respect of the said sums of 298,000*l.* preference stock (valued at 390,380*l.* as aforesaid), 98,687*l.* and 40,032*l.* 4*s.* 2*d.*, together amounting to 529,099*l.* 4*s.* 2*d.*

Mellish (*Davison* with him) argued for the appellant, (January 23).—The case involves two points; first, whether the debts of the Ulverstone Company, viz., the debenture debt of 98,687*l.* and the 40,032*l.* 4*s.* 2*d.* schedule debts, which the Furness Company undertook to pay, are to be deemed a money consideration for the sale; and secondly, whether the preferential stock of the nominal amount of 298,000*l.* which the Furness Company have allotted to the shareholders of the Ulverstone Company is part of the consideration in respect of which ad valorem duty is payable. The 13 & 14 Vict. c. 97, s. 1, repeals the duties payable under the 55 Geo. 3, c. 184, and imposes new duties in lieu thereof. By the 13 & 14 Vict. c. 97, Schedule, tit. “Conveyance” (a), an ad valorem duty is imposed on every des-

(a) “Conveyance, whether grant, disposition, lease, assignment, transfer, release, renunciation, or of any other kind or description whatsoever, upon the sale of any lands, tenements, rents, annuities, or other property, real or personal, heritable or moveable, or of any right, title, interest, or claim in, to, out of, or

upon any lands, tenements, rents, annuities, or other property, that is to say, for and in respect of the principal or only deed, instrument, or writing, whereby the lands or other things sold shall be granted, leased, assigned, transferred, released, renounced, or otherwise conveyed to or vested in the purchaser or purchasers, or any

cription of conveyance upon the sale of property real or personal, where the purchase or consideration money shall amount to or exceed a certain sum. That differs from the 55 Geo. 3, c. 184, inasmuch as that Act contained a limit beyond which there was no increase of duty. The 13 & 14 Vict. c. 97, Schedule, tit. "Conveyance," also requires the purchase money or consideration to be truly expressed in the deed, and where it consists either wholly or in part of stock

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other person or persons by his, her, or their direction ;

"Where the purchase or consideration money therein or thereupon expressed shall not exceed 25*l.*, &c.

"And where the purchase or consideration money shall exceed 600*l.*, then for every 100*l.* and also for any fractional part of 100*l.*, &c.

"And it is hereby directed, that the purchase money or consideration *shall be truly expressed and set forth in words at length* in or upon every such principal or only deed or instrument of conveyance ; and where such consideration shall consist either wholly or in part of any stock or security, the value thereof respectively, to be ascertained as hereinafter mentioned, shall also be truly expressed and set forth in manner aforesaid in or upon every such deed or instrument ; and such value shall be deemed and taken to be the purchase or consideration money, or part of the purchase or consideration money, as the case may be, in respect whereof the *ad valorem* duty shall be charged as aforesaid.

"And where the consideration

or any part of the consideration shall be any stock in any of the public funds, or any Government debenture or stock of the Bank of England or Bank of Ireland, or any debenture or stock of any corporation, company, society, or persons or person, payable only at the will of the debtor, the said duty shall be calculated (taking the same respectively, whether constituting the whole or a part only of such consideration,) according to the average selling price thereof respectively on the day or on either of the ten days preceding the day of the date of the deed or instrument of conveyance, or if no sale shall have taken place within such ten days, then according to the average selling price thereof on the day of the last preceding sale ; and if such consideration or part of such consideration shall be a mortgage, judgment, or bond, or a debenture, the amount whereof shall be recoverable by the holder, or any other security whatsoever, whether payable in money, or otherwise, then such calculation shall be made according to the sum due thereon for both principal and interest."

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2643*l.* 15*s.*, being such a sum as, together with 1*l.* 15*s.*, the stamp duty already paid on the said deed, is equal to the duty so assessed and charged; and the said deed was thereupon stamped with stamps denoting the said further duty of 2643*l.* 15*s.*, so assessed as aforesaid.

The question for the opinion of the Court is, whether the said deed of the 4th day of August, 1863, is chargeable with ad valorem conveyance duty in respect of the said sums of 298,000*l.* preference stock (valued at 390,380*l.* as aforesaid), 98,687*l.* and 40,032*l.* 4*s.* 2*d.*, together amounting to 529,099*l.* 4*s.* 2*d.*

Mellish (*Davison* with him) argued for the appellant, (January 23).—The case involves two points; first, whether the debts of the Ulverstone Company, viz., the debenture debt of 98,687*l.* and the 40,032*l.* 4*s.* 2*d.* schedule debts, which the Furness Company undertook to pay, are to be deemed a money consideration for the sale; and secondly, whether the preferential stock of the nominal amount of 298,000*l.* which the Furness Company have allotted to the shareholders of the Ulverstone Company is part of the consideration in respect of which ad valorem duty is payable. The 13 & 14 Vict. c. 97, s. 1, repeals the duties payable under the 55 Geo. 3, c. 184, and imposes new duties in lieu thereof. By the 13 & 14 Vict. c. 97, Schedule, tit. "Conveyance" (*a*), an ad valorem duty is imposed on every des-

(*a*) "Conveyance, whether grant, disposition, lease, assignment, transfer, release, renunciation, or of any other kind or description whatsoever, upon the sale of any lands, tenements, rents, annuities, or other property, real or personal, heritable or moveable, or of any right, title, interest, or claim in, to, out of, or

upon any lands, tenements, rents, annuities, or other property, that is to say, for and in respect of the principal or only deed, instrument, or writing, whereby the lands or other things sold shall be granted, leased, assigned, transferred, released, renounced, or otherwise conveyed to or vested in the purchaser or purchasers, or any

cription of conveyance upon the sale of property real or personal, where the purchase or consideration money shall amount to or exceed a certain sum. That differs from the 55 Geo. 3, c. 184, inasmuch as that Act contained a limit beyond which there was no increase of duty. The 13 & 14 Vict. c. 97, Schedule, tit. "Conveyance," also requires the purchase money or consideration to be truly expressed in the deed, and where it consists either wholly or in part of stock

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other person or persons by his, her, or their direction ;

"Where the purchase or consideration money therein or thereupon expressed shall not exceed 25*l.*, &c.

"And where the purchase or consideration money shall exceed 600*l.*, then for every 100*l.* and also for any fractional part of 100*l.*, &c.

"And it is hereby directed, that the purchase money or consideration *shall be truly expressed and set forth in words at length* in or upon every such principal or only deed or instrument of conveyance ; and where such consideration shall consist either wholly or in part of any stock or security, the value thereof respectively, to be ascertained as hereinafter mentioned, shall also be truly expressed and set forth in manner aforesaid in or upon every such deed or instrument ; and such value shall be deemed and taken to be the purchase or consideration money, or part of the purchase or consideration money, as the case may be, in respect whereof the *ad valorem* duty shall be charged as aforesaid.

"And where the consideration

or any part of the consideration shall be any stock in any of the public funds, or any Government debenture or stock of the Bank of England or Bank of Ireland, or any debenture or stock of any corporation, company, society, or persons or person, payable only at the will of the debtor, the said duty shall be calculated (taking the same respectively, whether constituting the whole or a part only of such consideration,) according to the average selling price thereof respectively on the day or on either of the ten days preceding the day of the date of the deed or instrument of conveyance, or if no sale shall have taken place within such ten days, then according to the average selling price thereof on the day of the last preceding sale ; and if such consideration or part of such consideration shall be a mortgage, judgment, or bond, or a debenture, the amount whereof shall be recoverable by the holder, or any other security whatsoever, whether payable in money, or otherwise, then such calculation shall be made according to the sum due thereon for both principal and interest."


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or security, the value is to be expressed in the deed and taken as the purchase or consideration money in respect whereof ad valorem duty shall be charged; and where the consideration, or any part thereof, shall be stock in any of the public funds &c., or any debenture or stock of any corporation, company or society, the duty shall be calculated according to the average selling price on the day, or either of the ten days preceding the day of sale. By the 55 Geo. 3, c. 184, Schedule, tit. "Conveyance," where lands are sold and conveyed subject to any mortgage, wadset, bond, or other debt, or to any gross or entire sum of money to be afterwards paid by the purchaser, such sum of money or debt shall be deemed the purchase or consideration money in respect whereof ad valorem duty is to be paid. The question is whether that provision is impliedly imported into the 13 & 14 Vict. c. 97. [*The Attorney General*.—The 16 & 17 Vict. c. 59, expressly recognizes and extends that provision.] It is conceded that the provision is applicable to the 40,032*l.* schedule debts, but the debenture debt is not within its language. [*Martin, B.*—The debenture debt is part of the consideration of the sale. The Furness Company, instead of paying that amount to the Ulverstone Company, undertake to discharge the debt.]

Secondly, ad valorem duty is not payable in respect of the preferential shares. The only stock which is liable to duty as the purchase or consideration money, is existing stock transferred by the vendee to the vendor in consideration of the sale. This stock had no previous existence, but was created by the Furness Company contemporaneously with the execution of the deed. The Act does not say that, whatever is the consideration, ad valorem duty shall be payable on its money value; but it uses the words "purchase or consideration money." This stock is merely substituted for another stock. Each holder of 100*l.* stock in the Ulver-

stone Company who was formerly entitled to an adequate share of the profits of that Company, now gets 100% preferential stock in the Furness Company which entitles him to a dividend of 6% per cent. payable out of the profits. The second head of the clause (a) has no application, because this is not stock, "payable only at the will of the debtor." [*Martin, B.*—The Furness Company agree to take upon themselves the debts of the Ulverstone Company, and to give the shareholders of that Company 298,000% preferential stock. Why is not that the purchase or consideration money?] The Act contemplates a purchaser being the owner of stock in some Company, which he transfers as the price of the purchase. This is a mere amalgamation of the two Companies; the shareholders of the Ulverstone Company become partners with the shareholders of the Furness Company. How could the value of this stock be ascertained on either of the ten days preceding the date of the deed, when the stock was not in existence? [*Pollock, C. B.*—Suppose the owner of an estate conveyed it in consideration of an annuity to himself for life?] *In re Earl Mount Edgecumbe and Gills' Conveyance* (b) is an authority that ad valorem duty would not be payable.

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The Attorney General (with whom was *The Solicitor General* and *Beavan*), for the respondents.—The 17 & 18 Vict. c. 83, Schedule, tit. "Conveyance," provides for the case of a conveyance in consideration of an annuity, so that if this transaction were of that nature ad valorem duty would be payable under that Act. But these preferential shares are part of the purchase or consideration money. There is no amalgamation of the two Companies. The Act of 1851 authorizes the sale of the one to the other, and part of the price is 298,000% preferential stock. The Ulverston

(a) *Antè*, p. 665.

(b) 8 Exch. 376.

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Company still exists as a corporation, and it is to be dissolved after all their debts and liabilities are satisfied. The 48th and 49th sections (a) of the Act of 1851 shew that the legislature contemplated a conveyance subject to ad valorem duty. The agreement of the 6th May, 1862, was followed by the deed of the 8th August, 1863, and in the interval the preferential stock of the Furness Company of the amount of 298,000*l.* had been created and allotted to the shareholders in the Ulverstone Company. There was therefore no difficulty in ascertaining their market value.—[He referred to the 4th, 7th, 12th, 13th, 14th and last articles of the agreement (b).]—The property of the Ulverstone Company became the property of the Furness Company, and the preferential stock became the property of the shareholders of the Ulverstone Company, independently of the deed, and a deed is only required as evidence of the transfer: sect. 49 (c). [Martin, B.—The deed does not fully set forth the full consideration for the transfer, but leaves it to be found out.] Although the agreement was made and the consideration paid long before, the duty must be calculated on the average selling price of the stock on or ten days preceding the day of the date of the deed. The 13 & 14 Vict. c. 97 does not say “any stock or security previously in existence” but “any stock or security.” There is therefore no foundation for the argument that the Act does apply to stock created and delivered as part of the transaction, but long prior to the execution of the deed. There is no distinction in this respect between “stock” and “security;” and could it be contended that a mortgage, judgment, bond or debenture, given upon a sale as part of the consideration, was not a “security” within the meaning of the Act, because it had no previous existence? The words “payable only at the

(a) *Antè*, p. 856, 857.

(b) *Antè*, p. 857.

(c) *Antè*, p. 859, 860, 861.

will of the debtor," which occur in the second branch of the clause, are not meant to qualify the general expression "any stock or security" in the previous branch, but only to exclude securities payable at the will of the creditor. [*Pollock*, C. B.—If stock is payable at the will of the creditor, it is a debt, and there is no occasion for any valuation, but if it is payable only at the will of the debtor, its value must be ascertained by the market price. *Pigott*, B.—The difficulty I felt was this, if it is stock within the first branch of the clause, recourse must be had to the second branch to ascertain its value, and then embarrassment arises from the words "payable only at the will of the debtor."]

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Mellish replied, and *The Attorney General* was also heard in reply.

The judgment of the Court was now delivered by

POLLOCK, C. B.—This is a case stated by the Commissioners of Inland Revenue, under the 13 & 14 Vict. c. 97, and the question is whether a deed of the 4th August, 1863, (between the Furness and the Ulverstone Railway Companies) is chargeable with ad valorem duty in respect of a sum of 390,380*l.* and two other sums, making altogether 529,099*l.* 4*s.* 2*d.* It was very correctly admitted by Mr. *Mellish*, on behalf of the Furness Railway Company, that with respect to the two latter sums ad valorem duty was legally chargeable, and the argument was confined to the sum of 390,380*l.* This sum represents the value of 298,000*l.* preference stock of the Furness Railway Company, at the price of 131*l.* per 100*l.* share, (being its average selling price on the day of the date of the deed.)

Some attention is necessary to collect from the deed what

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is the transaction between the two Companies. According to the 49th section of the Ulverstone and Lancashire Railway Act, 1858, this deed is to state fully and truly the full consideration for the deed. It is to be collected from the recitals of this deed that, prior to the year 1858, there were two railway Companies, one called in the deed the Ulverstone Company, the other the Furness Company, and by the act of parliament before mentioned, viz. the Ulverstone and Lancashire Railway Act, 1858, it was enacted that the Ulverstone Company might sell, and the Furness Company buy, the works or undertaking of the Ulverstone Company, upon such terms as might be mutually agreed on by an agreement to be made between the two Companies, which agreement was to be submitted to the Board of Trade for their approval. And by section 49 it was enacted, *that the transfer should be evidenced by a deed of transfer duly stamped, and wherein the full consideration for the deed of transfer should be fully and truly stated.* The deed further recited the agreement dated the 26th May, 1862, and that it was approved of by the Board of Trade, and it is to the effect that the Ulverstone Company had issued shares to the amount of 298,000*l.*, and were indebted in 138,000*l.* odd, and that it was agreed that the Ulverstone Company should sell, and the Furness Company buy, the *whole of the undertaking of the Ulverstone Company* subject to all the debts of the Ulverstone Company, and that the Furness Company should create preferential stock to the nominal amount of 298,000*l.*, which should be allotted to the then shareholders of the Ulverstone Company as fully paid up stock with a perpetual preferential dividend of 6*l.* per cent. per annum. That this preferential stock should not confer any right of voting at any general meeting of the Furness Company, and that the Furness Company should deliver to the Ulverstone Company certificates of the pre-

ferential stock to be distributed by them amongst their shareholders, and that they, in exchange, would procure and cancel and deliver to the Furness Company the original share certificates of the Ulverstone Company, and that thereupon the Ulverstone Company's capital of 298,000*l.* should be extinguished and the Furness Company's preferential stock of 298,000*l.* substituted for it. This is the agreement recited in the deed. The deed then, amongst other things, recites that the preferential stock of the amount of 298,000*l.* had been created and allotted to the shareholders of the Ulverstone Company, and that the certificates thereof had been duly made out, delivered and distributed, and that both Companies had performed, on their respective parts, every thing to be by them performed by virtue of the said agreement of 26th May, 1862. The deed then witnessed that, in consideration of the agreement, the whole undertaking of the Ulverstone Company, subject to their debts, was, by virtue of the Act of 1858, transferred to and vested in the Furness Company absolutely and for ever, and that this deed was made and executed in consideration of the proviso in sect. 49 of the Act of 1858.

The result of the transaction is, that the Ulverstone Company was substantially a body of shareholders holding stock to a nominal amount of 298,000*l.*, and owing debts to the amount of 138,719*l.* odd, and they agreed to sell their undertaking to the Furness Company for new preferential shares of their Company to the same nominal amount paying a perpetual preferential dividend of 6*l.* per cent. per annum, the Furness Company also taking upon themselves the payment of the debts of the Ulverstone Company. Before the deed was executed the new preferential shares had been created, and allotted and distributed amongst the shareholders of the Ulverstone Company, and were being sold in the market, and on the day of the date of the deed, that

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is to say the 4th August, 1863, at an average price of 131*l*. per share, or in other words the shares were at 31*l*. premium. This is not stated in the deed, but is stated as part of the case by the Commissioners, and the question is whether ad valorem duty is payable upon the value of this preferential stock, by virtue of the statute 13 & 14 Vict. c. 97, Schedule, tit. "Conveyance." By it the conveyance upon the sale of any property, when the consideration money therein expressed is in pounds sterling, is subject to a certain rate of duty, and the schedule then directs that, when such consideration shall consist either wholly or in part of stock, the value thereof shall be ascertained as in the next paragraph mentioned, *and shall be truly expressed and set forth in words at length in every such deed, and such value shall be deemed to be the purchase or consideration money, or part of it, as the case may be, in respect whereof ad valorem duty shall be charged, and one of the modes of ascertaining the value is that adopted by the Commissioners in this instance, viz. the average selling price of the stock on the day of the date of the deed.*

We think it is only necessary to understand the transaction to see that it directly falls within the words of the statute. The vendors were the corporation called the Ulverstone Company, and this Company were a number of shareholders holding stock to the amount of 298,000*l*. upon which they were entitled to dividends if the undertaking earned them, and they agreed to sell their undertaking for 298,000*l*. perpetual preferential shares of the Furness Company paying a perpetual preferential dividend of 6*l*. per cent. We think it is clear that part of the consideration for the sale was stock. It was argued that it was not stock within the meaning of the second paragraph in the Schedule, tit. "Conveyance," because stock of some third Company was meant by that, but we think

there are no grounds for so contending. If the Furness Company had occasion to buy land, and proposed to pay for it by shares in their concern, we think such shares would be within the statute.

We are clearly of opinion that such a deed as is directed by the 49th section ought to be stamped as the Commissioners determined, and that they have correctly decided the amount of ad valorem duty which ought to be paid.

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THIS was an action of ejectment to recover two closes of land, called Long Close and Short Close, and two cottages, in Hedge, in the county of Derby. By consent and order of a Judge, the following case was stated for the opinion of this Court, without pleadings.—

Joseph Jepson, being seised in fee simple of the lands and cottages next hereinafter mentioned, made his will dated the 10th of March, 1840, of which the following is a copy:—

“This is the last will and testament of me Joseph Jepson, of the city of London. In the first place I will and direct that all my just debts, funeral and testamentary expences be paid, and I give and devise to my dear wife Elizabeth, all my part, share, estate or interest of and in the dwelling house or tenement, and likewise the several closes or parcels of land hereinafter mentioned, and

In 1840, a testator devised as follows:—
 “I give and devise to my wife, all my part, share, estate or interest of and in the dwelling-house or tenement, and likewise the several closes or parcels of land hereinafter mentioned (describing them). And I also give and bequeath all my goods and chattels, dwelling-house or tenement heretofore mentioned

unto my said wife for her use and interest during the term of her natural life; and after her decease I give and devise all my property, real and personal, unto my heir or heirs, to be equally divided among them and as joint heirs, of this my above mentioned property.” Several years afterwards the testator became possessed of two other closes and two cottages, and died in 1850.—*Held*, that the after acquired property passed under the will, and the testator's wife took a life interest in it.

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now in the occupation of Charles Stoppard, that is to say, the Pear Tree Close, the Middle Close, the Roe Close, and the Clover Piece, situate at Heage, in the county of Derby, devolved to me at the death of my father, John Jepson, the younger. And I also give and bequeath all my goods and chattels, freeholds, dwelling-house or tenement heretofore mentioned, unto my said wife, Elizabeth, for her use and interest during the term of her natural life, and after her decease I give and devise all my property, real and personal, unto my heir or heirs, to be equally divided among them, and as joint heirs of this my above mentioned property. Lastly, I nominate, constitute and appoint my two brothers in law, my said wife's brothers William Booth, grocer, &c., of Green Hill Lane, in the parish of Alfreton, and in the county of Derby, and Job Booth, junior, of Pentrich, and in the county of Derby, as joint executors or trustees to this my will, and revoking hereby all former and other wills by me at any time heretofore made, I do hereby declare this only to be my last will and testament."

Several years subsequent to the date of his will, and prior to the 9th of June, 1850, an aunt of the testator devised to him the above mentioned property called the Long Close, Short Close, and two cottages, the subject matter of this action.

The testator died on the 9th of June, 1850, and his will was proved on the 24th March, 1851.

The plaintiff is the eldest son of the testator. The defendant's wife, Elizabeth Key, is his widow.

The question is, whether the Long Close, Short Close, and the cottages passed by the will of the testator to his widow for her life, or descended to the plaintiff as his eldest son.

If they descended to the plaintiff, judgment shall be entered up for him.

If they passed by the will to the testator's widow, judgment shall be entered for the defendant.

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Fitzjames Stephen, for the plaintiff.—No estate passed under the will in the subsequently acquired property, and consequently it devolved upon the plaintiff as heir at law. If the first clause of the will had stood alone, the testator's wife would have taken an estate in fee simple in the property specified, but the second clause cuts down the fee to an estate for life. That clause is not more extensive than the first, and does not include property, other than that specifically mentioned in the will; its object being simply to reduce from a fee simple to a life estate the interest given to the wife by the first clause. It would be putting a strained construction on the words in the second clause "heretofore mentioned," to hold that they applied to the dwelling-house and not to the freeholds mentioned in connection with it. Since the Wills Act, 7 Wm. 4 & 1 Vict. c. 26, s. 24, a will must be construed, with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will. But in order to ascertain the meaning of the will, regard must be had to the state of things at its date. At that time the testator had no real property except that mentioned in the first clause: and the effect of that and the second clause is merely to give his wife a life interest in all the property which he then possessed. The third clause is a general devise of his real and personal property to his heirs jointly after the death of his wife. That does not give the wife a life estate in after acquired property. The words "above mentioned property" in the third clause refer to the subject-matter of the first and second clauses, the first, which is most specific, being the key to the whole.

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The true meaning is, "I give to my wife all the property I am now possessed of for her life, and after her decease to my heirs." The intention of the testator was to die intestate as to after acquired property. The general rule is, that an heir at law can only be disinherited by express devise or necessary implication: and by necessary implication is meant such a strong probability that an intention to the contrary cannot be supposed: *Rex v. The Inhabitants of Ringstead* (a). [Martin, B.—What is there in the will inconsistent with the wife taking an estate for life in all the property of which the testator died possessed?] The testator having used the words "heretofore mentioned" and "above mentioned" property, the more natural construction is to apply them to the property before mentioned.—He also referred to *Simpson v. Hornby* (b), Jarman on Wills, vol. 1, chap. x., p. 299, 307, 313, 3rd ed.

Field, for the defendant.—The will must be construed as if executed immediately before the death of the testator, unless a contrary intention appears, which is not the case. The words "hereinafter mentioned" in the first clause refer to the four closes of land therein specifically mentioned, and not to the preceding subject-matter the "dwelling-house or tenement." The words "heretofore mentioned" in the second clause refer to the "dwelling house or tenement" mentioned in the first clause. There is nothing to indicate an intention on the part of the testator to die intestate as to any portion of his property, and there is no ground for limiting the word "freeholds" in the second clause to the closes of land mentioned in the first. The testator's intention was that his wife should enjoy all his property during her life. His appointment of her brothers as executors shews that she was in his mind. It

(a) 9 B. & C. 218. 224.

(b) Prec. in Chan. 439. 452.

has become a settled distinction that a devise *to the testator's heirs* after the death of A. will confer on A. an estate for life by implication ; but that under a devise to B. a stranger, after the death of A. no estate will arise to A. by implication : Jarman on Wills, chap. xvii., p. 497, 3rd ed.

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POLLOCK, C. B.—It appears to me evident that if this will be construed, as required by the 7 Wm. 4 & 1 Vict. c. 26, s. 24, to speak and take effect as if executed immediately before the death of the testator, he gives and devises *all* his property. He uses language which will comprise any quantity of real and personal property which he may be possessed of at the time of his death : “ And I also give and bequeath all my goods and chattels, freeholds, dwelling-house or tenement heretofore mentioned unto my said wife Elizabeth for her use and interest during the term of her natural life ; and after her decease I give and devise all my property, real and personal, unto my heir or heirs, to be equally divided amongst them, and as joint heirs of this my above mentioned property.” There can, I think, be no doubt as to the testator's intention, which was simply this :—a devise of all his property to his wife for life, and after her death a devise of it to his heirs ; which would by implication confer on the wife an estate for life. I find it stated in Jarman on Wills, vol. 1, chap. xvii., p. 505, 3rd ed., that “ the position that a devise to the heir after the death of A. creates in A. an implied estate for life, supposes that the will does not contain a residuary devise ; for a clause of this nature would, by disposing of such intermediate estate, and thereby intercepting the descent to the heir, clearly exclude all ground for the implication.” That assumes that the devise to the heir after the death of A. creates in A. an estate for life by implication. The learned author

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proceeds: "Thus, if a testator devises Whiteacre to his heir apparent or heir presumptive after the death of his wife, and in the same will devises the residue of his real estate to A. (a stranger), since the estate for life, not included in the devise to the heir, would, if no implied gift were raised, pass to A. as real estate not otherwise disposed of, which might possibly be intended, the residuary devisee, and not the wife, would, it is conceived, take the estate during her life." Assuming that to be law, the only question here is, do the words "all my property, real and personal," include after acquired property? I am clearly of opinion that they do, and consequently our judgment must be for the defendant.

MARTIN, B.—I am of the same opinion. We must construe this will according to the directions of the 24th section of the 7 Wm. 4 & 1 Vict. c. 26, which enacts: "That every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will." Therefore it is incumbent on the plaintiff to shew upon the face of the will an intention on the part of the testator that his wife should not take a life interest in all the property which he might possess at the time of his death. But in my opinion a contrary intention appears. I think he meant her to take it, because he meant that his heirs, after her death, should take *all* his property real and personal. By the words "all my goods and chattels," and "freeholds," he meant *all* his goods, *all* his chattels and *all* his freeholds. Probably he used the words "heretofore mentioned" because, in the first instance, he gave to his wife absolutely the dwelling-house or tenement and the four closes, and then altered his mind and

said that she shall have only a life estate in them. That however, is mere speculation, not construction. It is sufficient to say that no "contrary intention" has been shewn, and therefore the after acquired property passed by the will, and our judgment must be for the defendant.

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CHANNELL, B.—I am also of opinion that our judgment ought to be for the defendant. The plaintiff claims as heir at law, and it is contended that we must construe this will as if the testator had died intestate as to the property in question. In my opinion that is not the true construction. It is not disputed that the 24th section of the Wills Act applies to this case; and the question then is how far that enactment assists us in the construction of this will. It is said that there are three clauses in the will; all relating to the same subject-matter, and that there is such a specific description in the first clause that the will cannot be read as including after-acquired property without doing violence to its language. I agree that if land is devised by a specific description, as "My estate in Berkshire called Greenacre," after-acquired property in another county would not pass under it, without doing violence to the language of the will and the plainly expressed intention of the testator. But if the devise is "all my freeholds," that would include after-acquired property. Here the first clause is: "I give and devise to my dear wife Elizabeth, all my part, share, estate, or interest of and in the dwelling-house or tenement, and likewise the several closes or parcels of land hereinafter mentioned, and now in the occupation" &c. Therefore the first description is "the dwelling-house or tenement," and then the four several closes afterwards mentioned by name. The second clause must be read with the first, and it is to be observed that it

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introduces the words "personal property" in conjunction with "freeholds, dwelling-house or tenement *heretofore mentioned*." I do not think those words have the operation ascribed to them by Mr. *Stephen*, and if I am able to get rid of them in the second clause I do not feel pressed with any difficulty arising from the use of the words in the third clause, "my above mentioned property." Applying the rule of construction laid down by the 24th section of the Wills Act, I am of opinion that the testator's after-acquired property passed by this will to his wife for life, and that no contrary intention appears on the face of the will.

PIGOTT, B.—I am of the same opinion. I think it clear that the testator intended to give his wife *all* his property, real and personal, during her life. That is the general intention; and the question is whether there is anything in the language of the will which prevents us from giving effect to that intention. We have been pressed with the words "*heretofore mentioned*" in the second clause, but I think they have been used inaccurately. In my opinion they are properly limited to the dwelling-house or tenement; and all "my property real and personal" in the third clause includes after acquired property.

Judgment for the defendant.

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MASON v. BIBBY.

Jan. 18.

PURSUANT to the 20 & 21 Vict. c. 43, s. 2, the following case was stated by two justices of the county of Lancaster for the opinion of this Court.—

A Local Board of Health for the district of Waterloo with Seaforth, in the county of Lancaster, has been duly constituted under the provisions of "The Public Health Act, 1848," (11 & 12 Vict. c. 63). By sect. 69 of that Act it is enacted, "That in case any present or future street, or any part thereof (not being a highway) be not sewered, levelled, paved, flagged and channelled to the satisfaction of the Local Board of Health, such Board may, by notice in writing to the respective owners or occupiers of the premises fronting, adjoining or abutting upon such parts thereof as may require to be sewered, levelled, paved, flagged or channelled, require them to sewer, level, pave flag or channel the same within a time to be specified in such notice, and if such notice be not complied with, the said Local Board may, if they shall think fit, execute the works mentioned or referred to therein; and the expenses incurred by them in so doing shall be paid by the owners in default," according to and as therein specified.

By section 150 of the Public Health Act, 1848, it is enacted, that "in all cases in which any notice is by this

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Health Act,
1848," s. 69,
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(not being a
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faction of the
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parts as may
require to be
sewered, &c.,
require them
to sewer, &c.,
the same
within a time
to be specified
in such notice;
and if such
notice be not
complied with,
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Board may
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in default. By
section 150,
in all cases in

which any notice is required to be given to the owner or occupier of any premises it shall be sufficient to address the notice to them by the description of the "owner" or "occupier" of the premises, and the notice shall be served either personally or by delivering the same to some inmate of the owner's or occupier's place of abode.—*Held*, that service of a notice by delivering it to the clerk of an owner at his place of business was a sufficient notice to satisfy the requirements of the 69th section, the 150th section being merely in aid of the service of notices: *Per Pollock, C. B., and Pigott, B.*

Per Martin, B., that the service was good under the 150th section. A place of business is a "place of abode," and a clerk an "inmate" within the meaning of the 150th section.

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Act required to be given to the owner or occupier of any premises, it shall be sufficient to address the notice to them by the description of the "owner" or "occupier" (as the case may require) of the premises (naming them) in respect of which the notice is given, without further name or description; and the notice shall be served upon them or one of them, as the case may require, either personally or by delivering the same to some inmate of his or their place of abode, or in the case of the occupier (and also in case of the owner if his place of abode be unknown) upon any inmate of the last mentioned premises, or if such premises be unoccupied, then in case the notice is required to be served upon the occupier (and in case of the owner also, if his residence be unknown), shall be sufficient to fix the notice upon some conspicuous part of the premises: Provided always, in the case of notices to the owner, that although his place of abode be known to the Local Board of Health, yet if it be not within the limits of their district, it shall be sufficient for them to transmit any notice directed to him by name through the post."

At a Petty Sessions holden at Liverpool, within and for the division of Kirkdale, (within which the said district of the Waterloo with Seaforth Local Board of Health is situate) on the 24th day of March, 1863, an information made on the 13th day of November, 1862, by the said Joseph Mason, therein described as the clerk to the said Waterloo with Seaforth Local Board of Health (hereinafter called the appellant), under the said 69th section of the said Public Health Act, 1848, was prepared, charging for that the said James Bibby (hereinafter called the respondent) was, on the 3rd day of September, 1861, the owner of certain premises situate on the east side of a certain street or road called Waterloo Road, in Waterloo, within the said district of the said Local Board of Health,

which said road on the day and year last aforesaid was not sewered, levelled, paved, flagged, channelled, metalled and lighted to the satisfaction of the said Local Board of Health, and that the said Local Board of Health had, by a certain writing dated the 3rd day of September, 1861, sealed with the common seal and signed by five of the members of the said Local Board of Health, given the said respondent, as owner of the said premises, they being premises fronting or abutting upon the said road, notice within the space of twenty-eight days from the date of the said notice to sewer, level, pave, flag, channel, metal and light, or make good so much of the said street or road as the said premises adjoined or abutted upon. And the said notice further stated that, in case he the said respondent failed to comply with the said notice within such time, the said Local Board might, if they should think fit, execute the said sewerage, levelling, paving, flagging, channelling, metalling and lighting, and the expense incurred by them in so doing must be paid by the said respondent together with the owners in default, if any, as therein mentioned. And further alleging that the said respondent or any other person did not, within twenty-eight days after the date of the said notice, execute the sewerage &c. mentioned in the said notice, whereupon the said Local Board executed the same. And in the said information it was further alleged that Alfred Taylor, the surveyor of the said Local Board of Health, had apportioned the costs of executing such sewerage &c. between and among the owners of premises fronting the said road according to the frontage of their respective premises, and that on such apportionment the said Alfred Taylor, to wit, on the 15th day of July, 1862, found and declared the proportion of the said respondent to be the sum of 245*l.* 0*s.* 6*d.* which had been demanded of the said respondent and which he refused to pay, (and which the said Local Board

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had not declared to be private improvement expenses), contrary to the statute.

The information was dismissed, on the ground that there was not sufficient evidence of proper service of notice upon the respondent according to the terms of the 150th section of the Public Health Act, 1848.

Upon the hearing of the information, the evidence as regards the service of the notice upon the respondent was as follows:—"William Berks, being sworn, said "I served a copy of a notice I produce (being the said notice of the 3rd day of September, 1861), on Mr. Bibby, at his office in Water Street in Liverpool aforesaid, on the 3rd of September, 1861. I asked a clerk if Mr. Bibby was in, and he said 'he is, and is engaged, and may be so some time.' I told the clerk I wanted to serve Mr. Bibby with the notice. I read a part of it to him (the clerk). It commenced by being addressed to Mr. James Bibby. I then gave it to the clerk, and he read it and seemed to understand it. I explained to him that it was to do some sewerage works at his premises in Waterloo. I waited a quarter of an hour for Mr. Bibby; he was not disengaged, and I did not see him; he (the clerk) said 'I'll see and give it to Mr. Bibby' "—who, on being cross-examined, said: "I only saw one clerk, I saw him through a small window in the partitioning of the office. I can't say from what I saw of this clerk what his occupation was."

Upon this the respondent contended that, as the notice was proved to have been served by being left with a clerk of the said respondent at the office or place of business of the respondent in Liverpool, the same not being the place of his residence, it was not legally served, and that it ought to have been served in one of the modes prescribed by the said 150th section of the Public Health Act, 1848, and that the words "inmate" and "place of abode" in the said sec-

tion referred to service on an inmate at the home or place of residence or dwelling place of the respondent and his family, and that the said clerk was not an "inmate," and the said place of business was not a "place of abode" within the meaning of the said Act.

The appellant, on the other hand, contended that the notice had been legally served, and that the words "place of abode" meant a place where the respondent abided or carried on his business, and where he was usually to be found in matters of business. And that the said clerk was an "inmate," and the said place of business was "place of abode," within the meaning of the said Act; and consequently that the service of the said notice was legal.

The question of law arising on the above statement for the opinion of the Court is—whether we are correct, in point of law, in finding that the said notice was not served as required by the 150th section of the said act of parliament. Therefore the judgment of this Court is requested thereon, or what should be done in the premises.

Leofric Temple, (with whom was *Mellish*), for the appellant.—The notice was duly served within the meaning of 11 & 12 Vict. c. 63, s. 150. Under the 17 & 18 Vict. c. 36, s. 1, which requires a description of the *residence* of every attesting witness to a bill of sale, it is sufficient if an attorney's clerk is described as of the office or place of business of his employer, though he sleeps elsewhere: *Blackwell v. England* (a), *Attenborough v. Thompson* (b). So in an affidavit to hold to bail, an attorney's clerk may state his place of *abode* to be the office where he is employed: *Haslope v. Thorne* (c); and an attorney suing in person may indorse the writ of summons with a statement

(a) 8 E. & B. 541.

(b) 2 H. & N. 559.

(c) 1 M. & Sel. 103.

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that he *resides* at his place of business: *Ablett v. Basham* (a). [Pollock, C. B.—The 59th section says that before a certain thing is done notice must be given; then, in order to prevent trouble, the 150th section says that it shall be sufficient to serve it upon the owner or occupier.]—The Court then called on

Vernon Lushington (with whom was *Brett*), for the respondent.—The question whether the office where the notice was served was the respondent's "place of abode," was a question of fact to be determined by the justices. [Pollock, C. B.—The meaning of an act of parliament is a question of law. The justices say that in their opinion the notice was not properly served because the respondent did not reside at the place where it was left: but they state facts for the Court to say whether they are correct in point of law.] The 150th section requires the notice to be served upon the owner or occupier; here it was left with a clerk. [Pollock, C. B.—By the general law a notice need not be served personally. A notice to quit is sufficient if left at the house.] By the 69th section notice is a condition precedent, and the 150th section prescribes the form in which it must be given. A statutory notice must strictly follow the statutory form. [*Pigott*, B.—Why may not a notice delivered to a servant, and by him delivered to his master, be a good notice?] The justices have not found as a fact that the respondent received the notice. It is evident that, in the 150th section, the legislature meant by "place of abode," "residence," because they first say "and also in case of the owner, if his *place of abode* be unknown;" and afterwards "in case of the owner also if his *residence* be unknown." No doubt, in some cases the Courts have considered that the word "residence" was satisfied by "place of business." But

(a) 5 E. & B. 1019.

its true meaning is thus defined by *Bayley, J.*, in *Rex v. The Inhabitants of Curry* (a):—"I take it that that word, where there is nothing to shew that it is used in a more extensive sense, denotes the place where an individual eats, drinks, and sleeps; or where his family or his servants eat, drink, or sleep." In fact the word "residence" means domicile or home: *Maybury v. Mudie* (b), *Lambe v. Smythe* (c). Moreover the clerk was not an "inmate" of the respondent's place of abode, within the meaning of the 150th section.

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POLLOCK, C. B.—The question put to us by the justices is whether they are correct in point of law in finding that the notice was not served as required by the 150th section, requesting the judgment of the Court thereon, or what should be done in the premises. I am of opinion that a notice addressed to and served on the respondent at his place of business by delivering it to his clerk, and taking pains to read and explain it, is a good notice, and therefore I should direct the justices to deal with the premises as if there had been no particular direction in the act of parliament.

I think that the 150th section was merely intended to provide in aid of those who have to serve notices, not to invalidate a notice otherwise perfectly good. It provides that in all cases in which any notice is by that Act required to be given to the owner or occupier of any premises it shall be sufficient to address the notice to them by the description of the "owner" or "occupier," and it provides that the notice shall be served in a particular manner. I am of opinion, therefore, that the 150th section does not apply to this case, in which there was a good notice served in a

(a) 4 B. & C. 953. 959.

(b) 5 C. B. 283.

(c) 15 M. & W. 433.

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manner which the law would recognise as effectual for any purpose. It seems to me that the authorities cited for the respondent have no bearing on this case.

With respect to the words "place of abode" and "inmate," although there is now no occasion to consider their meaning, I am of opinion that a place of business is a "place of abode," and a clerk is an "inmate," within the meaning of this Act.

MARTIN, B.—I entertain no doubt that this notice was properly served within the meaning of the Act. A notice may be served on the owner or occupier either personally or by delivering it to some inmate of their place of abode. Now, I think a man may have two places of abode, one where he abides at night, and another where he abides by day. The respondent resides some distance from Liverpool, and abides during the day at his office in Liverpool, where he would be seen on matters of business. It seems to me that the respondent would have had just cause for complaint if, when he could be seen at Liverpool during the day, he had been served with the notice at his private residence after leaving business. I answer the question put to us by saying that the justices are not correct in their finding. In my judgment the notice was served as required by the 150th section.

PIGOTT, B.—I am of the same opinion. I think that if the justices had found that the notice was delivered to a servant of the respondent, and that the servant afterwards handed it to his master, they would have been bound to find that he had been served, though that mode of service is not prescribed by the Act. Therefore I agree with the Lord Chief Baron that there has been a sufficient

notice as required by the 69th section. The question is, whether the justices are correct in their finding and I am of opinion that they are not. 'Though it is not necessary to determine the point, I am clearly of opinion that for the purposes of this Act, "place of abode" includes "place of business."

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Determination of justices reversed.

BRUNT v. THE MIDLAND RAILWAY COMPANY.

Jan. 15.

THE declaration stated that the defendants were common carriers of goods for hire from Derby to Manchester, and that the plaintiff delivered to the defendants, and the defendants received as such carriers, goods of the plaintiff, to be by them safely and securely carried from Derby to Manchester, and to be there safely and securely delivered for the plaintiff, for reward to the defendants.—Averments: that all conditions were fulfilled and all things happened necessary to entitle the plaintiff to have the goods safely and securely carried, and to maintain this action.—Breach: that the defendants did not safely and securely carry the said goods, and so negligently carried the same that they were damaged, spoiled, and rendered unsaleable, and were so delivered damaged, spoiled, &c.

Pleas.—First: as to not safely and securely carrying a certain part of the said goods, and so negligently carrying the same that they were injured, &c., the defendants say that the said part was articles and property of the description mentioned in an act of parliament, &c. (11 Geo. 4 & 1 Wm. 4, c. 68), intituled &c., and was contained in a

"Elastic silk webbing" is a woven fabric each yard of which contains an ounce of silk, an ounce and a quarter of india-rubber, and three quarters of an ounce of cotton, the silk being of greater value than the two other materials.—*Held*, as a matter of fact (the question being reserved for the Court, with power to draw inferences), that this webbing was "silks wrought up with other materials" within the meaning of the Carriers Act, 11 Geo. 4 & 1 Wm. 4, c. 68, s. 1.

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parcel which, with the said part of the said goods therein contained, was delivered by the plaintiff to a servant of the defendants, as common carriers by land for hire, and that the value of the said part exceeded 10*l.*: that at the time of the delivery thereof the value and nature thereof were not declared by the person sending or delivering the same, nor any increased charge paid over and above the ordinary rate of charge, as a compensation for the greater risk and care to be taken for the conveyance thereof, &c.

Secondly: as to the residue of the declaration, payment into Court of 5*l.*, which sum is enough to satisfy the claim of the plaintiff, &c.—Issues thereon.

At the trial, before *Cockburn*, C. J., at the Derbyshire Summer Assizes, 1863, it appeared that the action was brought to recover the value of a hamper of elastic webbing, which the plaintiffs had delivered to the defendants at Derby, to be carried to Manchester, and which on its arrival there was found to be damaged by water. Elastic webbing is a woven fabric of mixed materials. There are three descriptions, called “silk webb,” “plaited webb,” and “cotton webb.” The webbing in question was “silk webb.” A yard of it weighed about three ounces, and contained about an ounce of silk, an ounce and a quarter of india-rubber, and three quarters of an ounce of cotton. The value of the silk was 12*d.* or 13½*d.* an ounce, the india-rubber 6*d.* an ounce, and the cotton 4½*d.* an ounce. In weaving the materials into the fabric, the weft is composed of the india-rubber and cotton, and the silk is shotted. In the “plaited webb” there are only two or three drachms of silk, and in the “cotton webb” there is no silk. The webbing in question was woven in pieces of five inches wide and twenty yards in length, and the value was 140*l.* 12*s.* 8*d.*

It was submitted on behalf of the defendants that the

webbing was silk wrought up with other materials, within the meaning of the Carriers Act, 11 Geo. 4 & 1 Wm. 4, c. 68, s. 1.

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The learned Judge proposed to leave two questions to the jury, first, whether the silk was the principal article in the fabric, and if not, secondly, whether it was a material part. But, after some discussion, it was finally arranged that the question whether the webbing was silk within the meaning of the 11 Geo. 4 & 1 Wm. 4, c. 68, s. 1, should be reserved for the determination of the Court above; and the question of damage was alone left to the jury who assessed it at 15*l.* beyond the 5*l.* paid into Court. A verdict was then entered for the plaintiff for that amount, leave being reserved to the defendants to move to enter the verdict for them, the Court to be at liberty to draw inferences of fact.

Macaulay, in the following Term, obtained a rule nisi accordingly; against which

Hayes, Serjt., and *Field* now shewed cause.—“Silk webb” is not within the language of the 11 Geo. 4 & 1 Wm. 4, c. 68, s. 1, “silks in a manufactured or unmanufactured state, and whether wrought up or not wrought up with other materials.” That contemplates a fabric which is substantially silk; but here the bulk of the material is india-rubber and cotton, and a little silk is added to improve the appearance of the fabric. Although a little alloy is mixed with gold, it remains substantially gold; but metal plated with gold cannot be called gold. Where is the line to be drawn? Does any addition of silk, however small, render the material a silk fabric? It would be absurd to call the “plaited webb,” in which only a drachm or two of silk

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is used, "silk wrought up with other materials." If the fabric is in one sense "silks," why is it not also india-rubber, or cotton? [*Martin, B.*—It is a question of fact whether this article is "silk wrought up with other materials."] There is no authority in point. In *Davey v. Mason* (a), Lord Abinger ruled that silk dresses made up for wearing are not "silks" within the meaning of the 11 Geo. 4 & 1 Wm. 4, c. 68, s. 1. No doubt that ruling was disapproved of in *Bernstein v. Baxendale* (b), where it was held that silk watch-guards are "silks in a manufactured state" within the meaning of the Act: but the watch-guards may have been wholly composed of wrought silk. The preamble of the 11 Geo. 4 & 1 Wm. 4, c. 68, shews that the mischief intended to be remedied was the sending articles of great value in a small compass. The word "silk" is not in the Act, but only "silks."

Macaulay and *Wills*, in support of the rule.—"Silk webb" is within the language of the Act for it is a fabric composed of silk wrought up with other materials. The silk gives the value to the article, and it is in respect of the value that the increased charge is required. In a note to *Davey v. Mason* (a), it is said:—"It may be worthy of consideration, whether the words 'wrought up with other materials' do not refer to poplins, challies, and other goods composed of a mixture of silk and worsted, or silk and cotton, and the like." The question "where is the line to be drawn?" may be thus answered, "Where do you draw it?" In *Bernstein v. Baxendale* (b), *Cockburn, J.*, said:—"It is said that the word 'silks,' in the plural, applies not at all to unwrought silk but to manufactured only. When the statute speaks of silks, would they be the less silks because made

(a) Car. & M. 45.

(b) 6 C. B. N. S. 251.

up into articles of wearing apparel? Indeed the value would be thereby increased, and certainly the danger against which it was the object of the statute to protect the carrier would not be diminished." And *Willes, J.*, in commenting on *Davey v. Mason*, points out that the words "in a manufactured or unmanufactured state and whether wrought up or not wrought up with other materials," are inconsistent with holding that "silks" means "cloths made of silk." There is nothing to shew that the watch-guards, in *Bernstein v. Baxendale*, were composed wholly of silk.

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POLLOCK, C. B.—We are all of opinion that the rule must be absolute. In order to protect carriers against loss by carrying, at a low price, articles of great value in a small compass, from which they suffered for a series of years, the legislature has interfered and said that if they incur increased responsibility they ought to be paid in proportion, in the same way as persons who insure. The legislature has therefore enumerated various articles, beginning with gold and silver coin, and including "silks in a manufactured or unmanufactured state, and whether wrought up or not wrought up with other materials," as to which the nature and value of the articles must be declared, and the increased charge paid, or the carrier will not be liable for the loss. The legislature has been careful to use the words "silk in a manufactured state," and "wrought up with other materials;" pointing to the difference between silk made up into any pattern, and silk interwoven with cotton or wool. I think, as observed by my brother *Martin*, that this is purely a question of fact for a jury: but, as it was left to us, I am of opinion that this precise matter was contemplated by the legislature when they used the words "silks wrought up with other materials." No doubt, the argument of my

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brother *Hayes* is entitled to weight. He asks "Where do you draw the line?" The answer given by Mr. *Wills* is, "Where do you draw it?" So that the line is shifted according to circumstances. However, I think that this case is within the line, wherever it may be, and that the rule ought to be absolute.

MARTIN, B.—I am of the same opinion. The legislature has enacted that carriers shall not be responsible for "silks in a manufactured or unmanufactured state, and whether wrought up or not wrought up with other materials," except under circumstances which do not occur in this case. A package containing a certain fabric was delivered to the defendants, and it is contended by them that it is "silks," within the meaning of this act of parliament. That the fabric is silk wrought up with other materials, no one can doubt, because each yard of it contains one ounce of silk, one ounce and a quarter of india-rubber, and three quarters of an ounce of cotton. I think that a jury is the proper tribunal to decide whether a particular fabric is silks wrought up with other materials; but we are placed in the position of a jury. Then we have a fabric in which a chief component part is silk; the object of the manufacturer is to give it the appearance of silk; an ignorant person looking at it with the naked eye would say it was silk, and it is called "elastic silk webb." Therefore I am of opinion, that a jury would come to the conclusion that this fabric was "silks wrought up with other materials." I regret that the question was not left to the proper tribunal, for the Court has not the same means as a jury of forming a correct opinion upon questions of fact.

CHANNELL, B.—I am also of opinion that the rule ought

to be absolute. It appears to me a question of fact, which might have been properly submitted to the jury in the manner in which the Lord Chief Justice was inclined to leave it. As, however, the question has been referred to the Court with liberty to draw inferences of fact, it seems to me, looking at the evidence and forming an opinion on an examination of the fabric (*a*) itself, that it is silk wrought up with other materials, within the meaning of the Act. I so decide, not as a matter of law, but sitting as a juror. If the case of *Davey v. Mason* were good law, I might have had some difficulty in coming to this conclusion, but it seems to me that case has been overruled by *Bernstein v. Baxendale*.

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PIGOTT, B.—I also think that this is not a question of law, but of fact, which might have been decided by the jury. But, as it has been reserved for the Court, with liberty to draw conclusions from the facts, looking at the proportion which the silk in the fabric bears in quantity and value to the other ingredients, I find that it is “silks wrought up with other materials,” within the meaning of the Act.

Rule absolute.

(*a*) A sample of the fabric was produced in Court, and handed up to the Bench.



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Jan. 18.

KEARSLEY v. OXLEY.

To a declaration against the defendant, as assignee of a lease of certain premises, alleging the non-payment of rent, he pleaded: 1st, that administration de bonis non of the lessee of the demised premises was granted to A. whom he afterwards married, and that neither he nor his wife ever entered into nor took possession of the demised premises, nor did they vest in the defendant otherwise than as in and by the plea appears. 2nd: (after repeating the grant of administration and

that the defendant married the administratrix) that the plaintiff sued the defendant and his wife as administratrix for the recovery of the same rent, and they pleaded plene administravit præter; that the plaintiff recovered judgment against them for the amount claimed, part thereof to be levied de bonis testatoris and the residue to be levied of assets quando acciderint. 3rd: (after repeating the matters alleged in the preceding plea) plene administraverunt præter goods not sufficient to satisfy the judgment debt.

Held, that all the pleas afforded a good answer as an argumentative traverse that the defendant was assignee: Per totam Curiam.

That the first plea was also good as shewing that the defendant, if liable at all, was only liable in a representative character, and that he never entered or took possession of the demised premises: Per *Channell*, B.

That the second plea was also good as a plea in the nature of a judgment recovered: Per *Pollock*, C. B., *Channell*, B., and *Pigott*, B.; *Martin*, B., dubitante.

That the third plea would have been bad, if it had not amounted to an argumentative traverse that the defendant was assignee: Per *Martin*, B., and *Channell*, B.

DECLARATION.—For that the plaintiff by deed let to Charles Ainsworth a cotton mill and premises to hold for ten years from the 12th day of February, A.D. 1854, at the yearly rent of 185*l.* payable quarterly, and the said C. Ainsworth by the said deed, for himself and his assigns, covenanted with the plaintiff to pay him the said rent aforesaid; and afterwards during the said term all the estate of the said C. Ainsworth in the said cotton mill and premises vested in the defendant by assignment; and afterwards, during the said term and while the defendant was assignee as aforesaid, six quarters of the said rent became and were and still are due and unpaid.

Pleas (inter alia).—Third: that after the making of the said deed the said C. Ainsworth, being then possessed of the said demised premises for the then residue of the said term under and by virtue of the said indenture, duly made and published his last will and testament in writing, and thereby appointed John Knowles and Richard Crompton his executors, and afterwards the said C. Ainsworth died so possessed of the said demised premises as aforesaid, without having

revoked or altered his said will, and afterwards the said J. Knowles duly proved the said will and died, leaving the said R. Crompton him surviving; and the said R. Crompton died intestate, and thereupon administration with the last will and testament of the said C. Ainsworth annexed of all and singular the goods, chattels and credits, which were of the said C. Ainsworth at the time of his death left unadministered by the said J. Knowles and R. Crompton, and by the said R. Crompton after the decease of the said J. Knowles were granted to Sarah Ainsworth, who afterwards and before suit took to her husband the defendant, and became and was and still is the wife of the defendant. And the defendant says that his said wife did not after the granting of the said administration as aforesaid, nor did the defendant after such marriage as aforesaid, enter into or take, nor were they or either of them in possession of the said demised premises or any part thereof; and that the estate of the said C. Ainsworth in the said cotton mill and premises did not vest in the defendant otherwise than as in and by this plea appears.

Sixth plea.—Except as to the last two quarters of the said rent, the defendant repeats the said third plea so far as the same relates to the matters therein alleged precedent to and inclusive of the allegations of the grant of such administration as aforesaid to the said Sarah and her becoming the wife of the defendant. And the defendant says that the plaintiff heretofore, in the Court of Exchequer of Pleas at Westminster, sued the defendant and the said Sarah Ainsworth as administratrix of the personal estate and effects which were of the said C. Ainsworth with the last will and testament of the said C. Ainsworth annexed in an action for the recovery of six quarters of the said rent, four thereof being the same four quarters as to which this plea is pleaded, in which said action the defendants therein

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pleaded, except as to the sum of 111*l.* parcel of the money claimed therein, that the said Sarah before her marriage with the now defendant, and the defendants therein since their intermarriage, had fully administered all the personal estate and effects which were of the said C. Ainsworth and which had ever come to the hands of the said Sarah as administratrix as aforesaid, or of the defendants, to be administered, except personal estate and effects of the value of 111*l.*; and that the defendants in the action had not, nor had either of them, at the time of the commencement of the said action, nor had they or either of them at the time of the pleading of the said plea, any personal estate or effects which were of the said C. Ainsworth in the hands of the said Sarah as administratrix as aforesaid, or of the defendants in the said action, to be administered, except the said personal estate and effects of the value aforesaid; and such proceedings were thereupon had in that action that the plaintiff by the judgment of the said Court in the said action recovered against the defendant and the said Sarah his wife, administratrix as aforesaid, 277*l.* 10*s.*, being the amount of the said six quarters rent, including therein the four quarters of the said rent as to which this plea is pleaded, and 13*l.* 1*s.* 6*d.* for his costs of suit, to be levied as to the said 111*l.*, part thereof of the said goods and chattels so as aforesaid acknowledged to be in the hands of the defendant and the said Sarah his wife to be administered, and as to the residue thereof to be levied of other goods and chattels which were of the said C. Ainsworth at the time of his death and which should thereafter come to the hands of the defendant and the said Sarah, his wife, as such administratrix with the will annexed as aforesaid to be administered; and the said judgment still remains in force.

Seventh plea.—As to the last two quarters of the said rent, the defendant repeats the said several matters in the last

preceding plea mentioned. And the defendant further says that there was and still is due and owing upon and by virtue of the said last mentioned judgment a large sum of money; and that the said Sarah before her marriage with the defendant had, and the defendant and the said Sarah since her intermarriage have fully administered all the goods and chattels which were of the said C. Ainsworth at the time of his death and which have ever come to the hands of the said Sarah Ainsworth as administratrix as aforesaid, or of the defendant, to be administered, except goods and chattels the value of which is not sufficient to satisfy the said judgment debt. And the defendant and the said Sarah had not, nor had either of them, at the commencement of this suit, nor have they nor has either of them since had, nor have they nor has either of them any goods or chattels which were of the said C. Ainsworth at the time of his death in the hands of the said Sarah Ainsworth as such administratrix as aforesaid, or of the defendant, to be administered, except the said goods and chattels the value of which is not sufficient to satisfy the said judgment debt, and which are liable to satisfy the same.

Demurrer to the pleas respectively, and joinder therein.

Miward, in support of the demurrers.—The third plea affords no answer to the declaration. It admits that the defendant is assignee of the term, and merely alleges that he is only assignee by reason of his wife being the administratrix de bonis non of the lessee. [*Martin*, B.—The defendant says, that whatever liability is imposed on him, it is only because he is the husband of the administratrix, and that neither he nor she ever entered or took possession of the demised premises.] Suppose the defendant had said that the premises merely vested in him as trustee, or mortgagee, that would have been no defence. [*Martin*, B.—

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Does not the plea amount to an argumentative traverse that the defendant is assignee?] In that view it is bad. 'The declaration charges the defendant as assignee, and under the traverse of that averment it would be sufficient for the plaintiff to prove that the defendant was husband of the administratrix. An executor who has not entered is liable as assignee, but he may discharge himself from personal liability by pleading that he is no otherwise assignee than by being executor of the lessee, and that he has never entered or taken possession of the demised premises; and from all liability as executor by alleging that the term is of no value, and that he has no assets: *Wollaston v. Hake-will* (a). [Channell, B.—The proper mode of pleading would be to reply that the defendant entered into possession of the premises.]

The sixth plea is also bad. A judgment recovered against the defendant and the administratrix is no answer to this action, unless the judgment is satisfied. This resembles the case of an action against the drawer and another against the acceptor of a bill of exchange. This plea does not allege that the defendant did not enter or take possession of the premises, and therefore he is chargeable as assignee.

The seventh plea, which is pleaded to the last two quarters rent, merely amounts to this, that the plaintiff recovered a judgment against the defendant and the administratrix for four other quarters rent, and that they have not sufficient assets to satisfy that judgment. That is no bar to this action, but the plaintiff is entitled to judgment of assets *quando acciderint*.

*Mellish*, in support of the pleas.—The third plea is good. It shews that the premises did not vest in the defendant otherwise than as the husband of the administratrix *de bonis non* of the lessee. An executor or administrator is not

(a) 3 Man. & G. 297.


liable as assignee unless he enters: *Tremeere v. Morison* (a). Neither can the husband of an executor or administrator be charged as assignee, unless either he or his wife has entered or taken possession of the premises. [*Martin, B.*—The person liable as assignee is the person in whom the term vests, and he is liable to the owner of the reversion by reason of the privity of estate.] The defendant, who has no interest in the term except as husband of the administratrix, cannot be sued without joining the wife.

The sixth plea is also good. There is no authority in point, but certain principles are well established. A lessor may elect to sue the executor of a lessee either as assignee or executor: 1 Wms. Saund. 111 a, note (c). If he sues him as assignee, the latter may plead that he holds only as executor, and that the land yields no profit, or that he has administered the assets: 1 Wms. Saund. 1, note (i). But if the lessor elects to sue the executor in his representative character, and upon a plea of plene administravit obtains judgment of assets quando acciderint, he cannot afterwards sue him as assignee, because the judgment binds the assets and the remedy is by scire facias. Applying those principles to this case, it is evident that the defendant is not liable as assignee when he is only the husband of an administratrix against whom a judgment has been obtained, which binds the assets of the testator whenever they should come to her hands.

The seventh plea is also good for the same reason. The plaintiff, having obtained against the defendant and the administratrix a judgment which binds the assets whenever they come to the hands of the administratrix, cannot sue her husband as assignee.

*Milward* replied.

(a) 1 Bing. N. C. 89.

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**POLLOCK, C. B.**—I am of opinion that the defendant is entitled to judgment on all the pleas.

With respect to the third, I think it affords a complete answer to the action. It shews that the defendant, who is sued as assignee of the term, is merely the husband of the administratrix de bonis non of the lessee. In order to render him liable as assignee, the allegation that neither he nor his wife entered or took possession of the premises should have been traversed.

With respect to the sixth plea, I also think that it affords a good answer to the action. It shews that a judgment has been already recovered against the administratrix of the lessee and the defendant, her husband, who was joined for conformity, in respect of the very same rent.

As to the seventh plea the same observations apply, as it repeats the matters in the former plea, and states that the assets have been fully administered.

**MARTIN, B.**—I am of the same opinion. All the pleas amount to an argumentative traverse of the averment in the declaration, that the estate of the lessee vested in the defendant by assignment. The pleas shew that the estate did not vest in the defendant by assignment, but that it vested in his wife as administratrix de bonis non of the lessee, and that whatever liability is imposed on the defendant is solely by reason of his being the husband of the administratrix. That is really what the third plea alleges, and it is repeated in the other pleas. If any inconvenience arises, it is entirely caused by the plaintiff having thought fit to sue the defendant without joining his wife.

With respect to the sixth plea, if it were not for the repetition of the matter to which I have adverted, I should have entertained some doubt. I cannot, however, help thinking that this action is brought against the husband alone

for the purpose of avoiding the consequence which would follow if the wife had been joined, for it would have been a complete answer that the plaintiff had recovered a judgment against the defendant and his wife, as administratrix, in respect of the same four quarters rent. But it seems to me that the plea affords a good defence for the reason I have already stated; and, further, I think that in all probability it is good as a plea in the nature of a judgment recovered.

With respect to the seventh plea, I think it is only good by reason of its amounting to an argumentative traverse that the defendant was assignee; for if the defendant had been administrator and had pleaded such a plea, it would not have been a good bar, because it does not negative the receipt of any profits during the period for which the rent accrued; and the lessor would be entitled to a specific appropriation of so much of those profits as sufficed to make up the rent, and the administrator would have no right to apply them in satisfaction of the judgment recovered for the previous rent.

CHANNELL, B.—I am also of opinion that the defendant is entitled to judgment upon each of the pleas.

The declaration charges the defendant as assignee, and I agree that it is sufficient to charge him generally, without stating in what character he is assignee. The third plea raises this defence, that the defendant, if liable at all, is only liable in a representative character, and not as a person in whom the premises vested by assignment for his own benefit. I do not think it necessary to decide what is the precise amount of liability which a man incurs who marries a woman in whom a lease for years has vested as administratrix. Taking it as against the defendant and in favour of the plaintiff, and looking at the declaration and plea together

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it is clear that the defendant is only assignee in a representative character. Now, a person sued as assignee of a term may shew that he is only the executor or administrator of the lessee, and that he never entered; and this plea avers that neither the defendant nor his wife, the administratrix, ever entered or took possession of the demised premises, nor did they vest in the defendant otherwise than in the character disclosed by the plea. I therefore think that the plea is, in substance, a good answer to the declaration.

But Mr. *Mellish* has contended that the plea is good on another ground. In general where a plea affords one good answer, that is sufficient without considering whether the plea is good on any other ground. But in this case it is important to see whether this plea is also good on the ground suggested, because if that conclusion be arrived at it will assist in deciding the matters arising on the sixth and seventh pleas. As I have before stated, the declaration need not shew in what character the defendant is charged as assignee; and the plea is a good answer if it only amounts to an argumentative denial that the defendant is assignee. Now, the plea shews that, whatever is the nature of the defendant's title, he is not assignee; but that his wife, who is the administratrix of the lessee, is assignee, and therefore ought to have been sued jointly with the defendant, who would only be joined in the action for the sake of conformity. Therefore this declaration, which charges the defendant, not with some liability as the husband of the administratrix, but as assignee, is shewn by the plea to be a bad declaration.

I am also of opinion that the sixth plea discloses a good answer to the declaration. It shews that the plaintiff sued the defendant and his wife in her representative character for the same rent, and recovered a judgment against them for the amount claimed, part to be levied de bonis testatoris,

and the residue to be levied of assets quando acciderint. I think that is a good answer to the declaration, and that it is not necessary that the plea should contain an averment that the premises never vested in the defendant otherwise than as stated in the plea. There is another ground on which it appears to me that the sixth plea affords a good answer, viz., that which I have adverted to in dealing with the third plea, that it amounts to an inartificial traverse of the allegation that the defendant is assignee; for it shews that whatever liability devolves on him, it is not as assignee, but because he is the husband of the administratrix.

With respect to the seventh plea, I think it would be bad if the last observation did not equally apply to it; and that it is only good because it in effect traverses the allegation that the defendant is assignee. Whether it would be a good plea in an action against the defendant and his wife as administratrix, it is not necessary to determine.

PIGOTT, B.—I am also of opinion that the third plea affords a good answer to the declaration on the grounds already stated. I confess that, during the course of the argument, I felt considerable doubt whether the other two pleas were good, for want of the allegation at the end of the third plea, that the premises did not vest in the defendant otherwise than as in and by that plea appears. However, in the result I come to the same conclusion as the rest of the Court.

Judgment for the defendant.

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RAFFLES v. WICHELHAUS and Another.

To a declaration for not accepting Surat cotton which the defendant bought of the plaintiff "to arrive ex *Peerless* from Bombay," the defendant pleaded that he meant a ship called the "*Peerless*" which sailed from Bombay, in October, and the plaintiff was not ready to deliver any cotton which arrived by that ship, but only cotton which arrived by another ship called the "*Peerless*," which sailed from Bombay in December. — *Held*, on demurrer, that the plea was a good answer.

**DECLARATION.**—For that it was agreed between the plaintiff and the defendants, to wit, at Liverpool, that the plaintiff should sell to the defendants, and the defendants buy of the plaintiff, certain goods, to wit, 125 bales of Surat cotton, guaranteed middling fair merchant's Dholorah, to arrive ex "*Peerless*" from Bombay; and that the cotton should be taken from the quay, and that the defendants would pay the plaintiff for the same at a certain rate, to wit, at the rate of  $17\frac{1}{4}d.$  per pound, within a certain time then agreed upon after the arrival of the said goods in England.—**Averments:** that the said goods did arrive by the said ship from Bombay in England, to wit, at Liverpool, and the plaintiff was then and there ready, and willing and offered to deliver the said goods to the defendants, &c. **Breach:** that the defendants refused to accept the said goods or pay the plaintiff for them.

**Plea.**—That the said ship mentioned in the said agreement was meant and intended by the defendants to be the ship called the "*Peerless*," which sailed from Bombay, to wit, in October; and that the plaintiff was not ready and willing and did not offer to deliver to the defendants any bales of cotton which arrived by the last mentioned ship, but instead thereof was only ready and willing and offered to deliver to the defendants 125 bales of Surat cotton which arrived by another and different ship, which was also called the "*Peerless*," and which sailed from Bombay, to wit, in December.

Demurrer, and joinder therein.

*Milward*, in support of the demurrer.—The contract was for the sale of a number of bales of cotton of a particular description, which the plaintiff was ready to deliver. It is immaterial by what ship the cotton was to arrive, so that it was a ship called the “Peerless.” The words “to arrive ex ‘Peerless,’” only mean that if the vessel is lost on the voyage, the contract is to be at an end. [*Pollock*, C. B.—It would be a question for the jury whether both parties meant the same ship called the “Peerless.”] That would be so if the contract was for the sale of a ship called the “Peerless;” but it is for the sale of cotton on board a ship of that name. [*Pollock*, C. B.—The defendant only bought that cotton which was to arrive by a particular ship. It may as well be said, that if there is a contract for the purchase of certain goods in warehouse A, that is satisfied by the delivery of goods of the same description in warehouse B.] In that case there would be goods in both warehouses; here it does not appear that the plaintiff had any goods on board the other “Peerless.” [*Martin*, B.—It is imposing on the defendant a contract different from that which he entered into. *Pollock*, C. B.—It is like a contract for the purchase of wine coming from a particular estate in France or Spain, where there are two estates of that name.] The defendant has no right to contradict by parol evidence a written contract good upon the face of it. He does not impute misrepresentation or fraud, but only says that he fancied the ship was a different one. Intention is of no avail, unless stated at the time of the contract. [*Pollock*, C. B.—One vessel sailed in October and the other in December.] The time of sailing is no part of the contract.

*Mellish* (*Cohen* with him), in support of the plea.—There is nothing on the face of the contract to shew that any particular ship called the “Peerless” was meant; but the

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moment it appears that two ships called the "Peerless" were about to sail from Bombay there is a latent ambiguity, and parol evidence may be given for the purpose shewing that the defendant meant one "Peerless" and the plaintiff another. That being so, there was no consensus ad idem, and therefore no binding contract.—He was then stopped by the Court.

Per CURIAM (a).—There must be judgment for the defendants.

Judgment for the defendants.


(a) *Pollock*, C. B., *Martin*, B., and *Pigott*, B.

Jan. 27. ANN MARCHMAN v. HENRY BROOKES, SARAH his Wife and JOHN HUGHES.

An administration bond, forfeited before the bankruptcy of the administrator, is not proveable under "The Bankrupt Law Consolidation Act, 1849," and consequently a certificate under that Act is no bar to an action on the bond.

**DECLARATION.**—For that the said Sarah and the said John Hughes, before the marriage of the said Henry Brookes, by their writing obligatory sealed with their respective seals, &c., acknowledged themselves to be held and firmly bound unto Sir *C. Cresswell*, the Judge of her Majesty's Court of Probate, in the sum of 400*l.*, &c., which said writing obligatory was and is subject to a certain condition whereby it was declared that if the above mentioned Sarah, the lawful widow and relict and administratrix of all and singular the personal estate and effects of Richard Baker, late of, &c., who died on the 11th November, 1858, did, when lawfully called upon in that behalf, make or cause to be made a true and perfect inventory of all and singular the personal estate and effects of the said R. Baker which had or should come to her hands, possession, or knowledge, or unto the hand

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and possession of any other person for her, and the same so made did exhibit or cause to be exhibited in the District Registry of Birmingham attached to her Majesty's Court of Probate whenever required by law so to do, and the same personal estate and effects, and all other the personal estate and effects of the said deceased at the time of his death which at any time after should come to the hands or possession of the said Sarah Baker, or into the hands or possession of any other person or persons for her, did well and truly administer according to law. And further did make or cause to be made a true and just account of the said administration whenever required by law so to do. And all the rest and residue of the said personal estate and effects did deliver and pay to such person or persons as should be entitled thereto under the act of parliament, intituled "An Act for the settling of intestate estates," &c.—(Then followed conditions not material to the present question.)—Breaches: that the said Sarah did not make or cause to be made a true and perfect inventory of certain personal estate and effects of the said deceased which came to her hands, possession, or knowledge, though a reasonable time for her to do so elapsed before this suit: And the said Sarah did not exhibit or cause to be exhibited in the said District Registry of Birmingham, when and though required by law so to do, any such inventory as aforesaid: And did not make a true and just account of her said administration, when and though required by law so to do: And wasted, instead of duly administering a great part of the said personal estate and effects of the said deceased, &c.—Averments: that the said bond was a bond which enured to the benefit of the Judge of the Court of Probate mentioned in "The Court of Probate Act, 1857," according to the provisions of that Act; and that the said Court did, on &c., pursuant to the provisions of the said Act, on application

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then made on motion and on being satisfied that the said condition of the said bond had been broken, order one of the registrars of the said Court to assign the same to the plaintiff then named in that order; and thereupon, on &c., one of the registrars of the said Court of Probate did, in virtue of that order and pursuant to the provisions of "The Court of Probate Act, 1858," assign the said bond to the plaintiff that he might sue thereon; and thereupon the plaintiff became and was entitled to sue on the said bond in her own name, and to recover thereon as trustee for all persons interested the full amount recoverable in respect of the said breaches of the said conditions of the said bond, according to the form of the statute, &c.; and all conditions were performed and all things happened, &c., to entitle the plaintiff as such assignee of the bond as aforesaid to commence and maintain this action, &c.

Plea by the defendant, Hughes.—That before action he became bankrupt within the meaning of the statutes in force concerning bankrupts, and that the causes of action in the declaration mentioned accrued before the defendant so became bankrupt.

Second replication.—That the said J. Hughes so became bankrupt as therein is mentioned and was adjudicated bankrupt thereupon, and obtained his certificate, being the discharge on which that plea relies, before the passing of the act of parliament made and passed in the twenty-fourth and twenty-fifth years of the reign of Victoria the Queen for amending the law relating to bankruptcy and insolvency in England.

Third.—That at the time of the said bankruptcy the said condition had not, nor has it now, wholly been performed, and it was then and is now, and always has been possible that further breaches of the said condition other than those which had been committed before the said bankruptcy might

and may be committed. And the plaintiff says that the damages in respect of the breaches in the declaration mentioned can never be ascertained or liquidated, and that if they had been they would not have amounted to the said penalty of the bond; and that the said penalty never was proved under the said bankruptcy, and that no proof in respect of the bond, or of anything secured thereby or payable thereunder was ever made under the said bankruptcy.

Demurrer to replications respectively, and joinder therein.

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*Field*, in support of the demurrers.—The question is whether a certificate in bankruptcy before the passing of the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), is a bar to this action. The plaintiff will contend that it is not, because, first, the claim being for unliquidated damages, the bond was not proveable under the Bankrupt Law Consolidation Act, 1849 (12 & 13 Vict. c. 106); and secondly, because the plaintiff is entitled to a judgment as a security for future breaches. In *Hankin v. Bennett* (a) the bond was conditioned to indemnify a nominal plaintiff against the costs which he might become liable to pay to the defendant in the suit, and that was held a mere contingent liability, and not a contingent debt proveable under the 6 Geo. 4, c. 16, s. 56. There, however, the bond was not forfeited at the time when the fiat issued; but the Court said that, if it had been, a question would have arisen whether the demand was proveable, under the authority of the case of *Hodgson v. Bell* (b). [*Martin*, B., referred to *Taylor v. Young* (c).] In *The Overseers of St. Martin v. Warren* (d), which was the case of a bastardy bond, it was held that it was a debt payable upon a contingency and in its nature wholly incapable of valuation, and therefore not proveable under a

(a) 8 Exch. 107.

(b) 7 T. R. 97.

(c) 3 B. & Ald. 521.

(d) 1 B. & Ald. 491.

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amongst the audience, and given away ;” and that the prices of the tickets of admission were stated to be three shillings and two shillings.

Warmingham went to the Newburgh Rooms the same evening. Jeffs was inside the door taking money for the admission of persons. Warmingham gave up the ticket he had obtained at Jeffs’, and one of the assistants put him into a seat. There was a number on the seat he occupied, and all the chairs and seats were numbered. Several persons came in and took seats, so far as was apparent casually. There was an entertainment, somewhat in accordance with the programme, which lasted about an hour and a half. After the entertainment, a quantity of goods plated and otherwise, similar to those which Warmingham had seen at Jeffs’ were brought in and put on a table. Morris placed himself at the table, and said that he considered that the best part of the performance was coming on now. He then took up a metal butter-cooler and said: “Any lady or gentleman occupying seat No. 345 shall receive this handsome present.” One of the assistants then took the cooler from Morris and carried it to the person occupying the seat 345, and that person took it and wrote something on a piece of paper and gave it the assistant, who delivered it to Morris, and afterwards the name of the person was called out. The other articles, nineteen or twenty in number, were distributed in like manner. Sometimes it was found that no one was in occupation of the chair the number of which was called by Morris, and then he called another, and so on till a chair was found occupied. Sometimes he distributed the article by name, and sometimes by speaking of it as a present. Warmingham went to the Newburgh Rooms on the following evening, and paid for admission at the door, and took a seat as he pleased. Jeffs was receiving money for admissions, and seats were taken in an apparently casual way by the persons attending, and articles distributed

by Morris as on the previous evening. Programmes similar to that which Warmingham had received of Jeffs were given to those attending the entertainment; and the number of articles distributed on the two evenings differed, and appeared to bear some proportion to the number of persons present at the entertainment.

The justices were of opinion that the whole proceeding on the part of Morris, and of Jeffs as aiding and abetting him, was a contrivance to conceal the real nature of the transaction; and that it was in fact a game or lottery within the provisions of the 42 Geo. 3, c. 119, and they convicted both defendants of the offence charged against them, and sentenced them as rogues and vagabonds to seven days imprisonment with hard labour.

*Lush* (*Poland* with him), for the respondent.—The 42 Geo. 3, c. 119, s. 2 (a), prohibits the keeping any office or place for drawing by numbers or figures, “*or by any*

(a) Enacts:—“That from and after the 1st day of July, 1802, no person or persons whatsoever shall publicly or privately keep any office or place to exercise, keep open, show, or expose to be played, drawn, or thrown at or in, either by dice, lots, cards, balls, or by numbers or figures, or by any other way, contrivance, or device whatsoever, any game or lottery called a *Little Go*, or any other lottery whatsoever not authorized by parliament, or shall knowingly suffer to be exercised, kept open, shown, or exposed to be played, drawn, or thrown at or in, either by dice, lots, cards, balls, or by numbers or figures, or by any other way, contrivance, or device whatsoever, any such

game or lottery, in his or her house, room or place, upon pain of forfeiting, for every such offence, the sum of 500*l.*, to be recovered in the Court of Exchequer, at the suit of his Majesty's Attorney General, and to be to the use of his Majesty, his heirs and successors; and every person so offending shall be deemed a rogue and vagabond within the true intent and meaning of an Act, passed in the seventeenth year of the reign of his late Majesty king George the Second, intituled *An Act to amend and make more effectual the laws relating to rogues, vagabonds, and other idle and disorderly persons, and to houses of correction, and shall be punishable as such rogue and vagabond accordingly.*”

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*other way, contrivance or device whatsoever*" any lottery not authorized by parliament. It is therefore immaterial what are the means devised, and the only question is whether the transaction is a lottery, that is, a scheme for the distribution of prizes. If the tickets had been numbered there could have been no doubt.

The Court then called on

*Sleigh*, for the appellant.—The transaction is not a lottery within the meaning of the 42 Geo. 3, c. 119. To constitute a lottery there must be a contract on the part of the proprietor that, in consideration of the money paid to him by the subscribers, he will distribute certain prizes amongst them. In this case the proprietor of the rooms only contracted to furnish the purchasers of tickets with the proposed entertainment; and he was under no legal obligation to distribute any articles amongst them. [*Martin*, B.—Then how could he fulfil that part of the programme which says that at the conclusion of every entertainment he will distribute amongst his audience a shower of gold and silver treasures?] That is a mere voluntary gift in return for the patronage received. There were no numbers on the tickets, and the calling out the numbers on the chairs was only a matter of convenience. All the statutes relating to lotteries, from the 10 & 11 Wm. 3, c. 17, to the 42 Geo. 3, c. 119, contemplate a distribution of prizes by lot or chance. Here the proprietor selects, according to his caprice, the person to whom he presents the article. The definition of "lottery," in Johnson's Dictionary, is "a game of chance, a sortilege; distribution of prizes by chance; a play in which lots are drawn for prizes." The words in the 43 Geo. 3, c. 119, s. 2, "or by any other way, contrivance, or device whatsoever," are governed by the antecedent words "by dice, lot, cards, balls, or by numbers or figures."

POLLOCK, C. B.—I apprehend that this is a question of fact, and in my opinion the magistrates have decided it correctly. If, as contended on the part of the appellant, there was a mere undertaking by the proprietor of the rooms to distribute, according to his caprice, various presents amongst the audience at the close of the entertainment, probably the public would not go there. I have no doubt that not one of the audience had the least notion that the proprietor of the rooms was to give the articles to any person he pleased; but that every one thought that he had a chance of winning them. What was intended and what the public understood was, that in some way or other, either by chance, or the numbers being called out, whether by drawing or in any other way, a number of prizes should be distributed amongst the audience.

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MARTIN, B.—The magistrates have found that the whole proceeding was a contrivance to conceal the real nature of the transaction; that it was in fact a game or lottery within the provisions of the 43 Geo. 3, c. 119, and they convicted both defendants. The question is whether there is any evidence which justifies that conviction. I think that the magistrates would have been wrong if they had not arrived at the conclusion which they have done. The 42 Geo. 3, c. 119, s. 2, declares that every person shall be deemed a rogue and vagabond who shall “keep any office or place to exercise, keep open, show, or expose to be played, drawn, or thrown at or in, either by dice, lots, cards, balls, or by numbers or figures.” If the enactment had stopped there, I should have thought that in this case there was a sufficient drawing by numbers or figures; but it proceeds to say, “*or by any other way, contrivance or device whatsoever.*” It is plain that this was a contrivance or device, because assuming that the proprietor of the rooms acted honestly and meant



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to distribute these articles amongst the audience, the fair way of doing it would have been by drawing the numbers from a box. In my opinion, the mere selecting certain persons by calling out numbers, so far from not being a lottery which is intended to be prohibited, is somewhat worse, for the proprietor might call out the numbers of such seats only as were occupied by persons acting in collusion with him. I am clearly of opinion that the transaction is a mere device for carrying into effect that which the legislature has expressly said shall not be done.

PIGOTT, B.—I am of the same opinion.

Determination of justices affirmed.

Jan. 12.

STAPLETON v. HAYMEN and Another.

The plaintiff bought and took possession of a barge. The transfer was by bill of sale in the statutory form, but, the plaintiff being under age, the transfer was not registered. In August, 1862, the vendor became bankrupt. Subsequently his assignees registered, but

**T**ROVER for a barge, sails, ropes, &c.

Pleas:—First, not guilty.

Second:—A traverse that the goods were the plaintiff's.

At the trial, before *Martin, B.*, at the London Sittings after Trinity Term, 1863, the following facts appeared:—

The plaintiff by bill of sale, dated the 19th of April, 1862, under seal, and in the form prescribed by the 17 & 18 Vict. c. 104, Sched. E., purchased from a person named Attwater for 100*l.* a barge of which the plaintiff had already taken possession when the bill of sale was executed. After the execution the plaintiff, accompanied by Attwater, took the

at what date did not appear. On the 3rd of September the plaintiff came of age. On the 6th of November the barge was seized by the messenger in bankruptcy:—*Held*, that the assignees were liable for the conversion of the barge, on the ground that either as against them the property passed by the bill of sale, or the bankrupt was a trustee for the plaintiff, and that the action was maintainable in the latter case by virtue of the plaintiff's possessory title.


bill of sale and certificate of registry to the Custom House at Rochester to get the transfer registered. The registrar, on learning from the plaintiff that he was under twenty-one years of age, declined to register the transfer, at the same time telling him that no one could interfere with his property in the barge. The plaintiff came of age on the 3rd of September, 1862. In July, 1862, Attwater became bankrupt, and on the 10th of August the defendants were appointed his assignees, and the barge was subsequently registered in their names. The proceedings in bankruptcy having been transferred to the County Court holden at Sheerness, the County Court bailiff, acting as messenger in bankruptcy, seized the barge on the 6th of November, and sold it on the 17th. The precise date when the barge was registered in the name of the assignees did not appear, nor whether it was before or after the seizure. The plaintiff had put a new mainsail and other fittings into the barge, for which he had paid 20*l*. The defendants did not dispute the bona fides of the sale to the plaintiff by Attwater.

On these facts a verdict was entered for the plaintiff for 120*l*., leave being reserved to the defendants to move to enter the verdict for them, or to reduce the damages to 20*l*.

*The Solicitor General*, in last Michaelmas Term, obtained a rule nisi to reduce the damages to 20*l*., on the ground that the plaintiff was not the legal owner of the barge; against which

*Joyce* shewed cause.—The plaintiff's possessory title is sufficient to enable him to maintain this action, unless the defendants can establish that they are the real owners. It is submitted however that the plaintiff is the owner, and

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that the property in the barge passed to him on the execution of the bill of sale. The defendants will no doubt rely on *Boyson v. Gibson* (a) as a decision in their favour. But that case was decided on the construction of a repealed statute (3 & 4 Wm. 4, c. 55), the language of which differs widely from the 17 & 18 Vict. c. 104. The 3 & 4 Wm. 4, c. 55 (sects. 34 and 35), enacted that no bill of sale should be valid and effectual to pass the property in a ship or for any other purpose *until* it was registered; and *when registered* that it should be valid and effectual. Therefore by that statute registration was made a condition precedent to the validity of the bill of sale. But under the 17 & 18 Vict. c. 104, it is not so. By the 55th section of that statute (b), the property in a ship passes immediately on the execution of a bill of sale in the form which the statute prescribes, although the transferee cannot himself *confer* a title until the transfer is registered. In *Dixon v. Ewart* (c), in the case of a ship at sea, Lord *Eldon* was of opinion that the bill of sale passed the interest, and not the subsequent formalities, which were merely a duty imposed for the completion of the title.—Secondly, assume that the *legal* interest did not pass upon the execution of the bill of sale. If that be the true view, then the bill of sale operated to create a trust between the bankrupt and the plaintiff, and a bare trust would

(a) 4 C. B. 121.

(b) Sect. 55.—“A registered ship, or any share therein, when disposed of to persons qualified to be owners of British ships, shall be transferred by bill of sale; and such bill of sale shall contain such description of the ship as is contained in the certificate of the surveyor, or such other description as may be suffi-

cient to identify the ship to the satisfaction of the registrar, and shall be according to the form marked E. in the schedule hereto, or as near thereto as circumstances permit, and shall be executed by the transferrer in the presence of and be attested by one or more witnesses.”

(c) 3 Mer. 322.

not pass to the assignees. The 99th section (*a*) assumes an infant to be incapable of making the declaration which the 56th section (*b*) requires as a condition precedent to registration under the 57th section (*c*). A trust must necessarily be contemplated by the 99th section, until by virtue of that section a substitute can be appointed who is able to comply with the formalities of the statute on behalf of the infant. The case of *The Liverpool Borough Bank v. Turner* (*d*) is distinguishable. Moreover since that case was decided the legislature has by express enactment recognised trusts

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(*a*) Sect. 99.—“If any person interested in any ship or any share therein is, *by reason of infancy*, lunacy, or other inability, *incapable of making any declaration* or doing anything required or permitted by this Act to be made or done by such incapable person in respect of registry, then the guardian or committee, if any, of such incapable person, or if there be none, any person appointed by any Court or Judge possessing jurisdiction in respect of the property of incapable persons, upon the petition of any person on behalf of such incapable person, or of any other person interested in the making such declaration or doing such thing, may make such declaration, or a declaration as nearly corresponding thereto as circumstances permit, and do such thing in the name and on behalf of such incapable person; and all acts done by such substitute shall be as effectual as if done by the person for whom he is substituted.”

(*b*) Sect. 56.—“No individual shall be entitled to be registered as transferee of a ship or any share therein until he has made

a declaration in the form marked F. in the schedule hereto, stating his qualification to be registered as owner of a share in a British ship, and containing a denial similar to the denial hereinbefore required to be contained in a declaration of ownership by an original owner,” &c.

(*c*) Sect. 57.—“Every bill of sale for the transfer of any registered ship, or of any share therein, when duly executed, shall be produced to the registrar of the port at which the ship is registered, together with the declaration hereinbefore required to be made by a transferee; and the registrar shall thereupon enter in the register book the name of the transferee as owner of the ship or share comprised in such bill of sale, and shall indorse on the bill of sale the fact of such entry having been made, with the date and hour thereof; and all bills of sale of any ship or shares in a ship shall be entered in the register book in the order of their production to the registrar.”

(*d*) 1 J. & H. 159; and on appeal, 2 De Gex, F. & J. 502.

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arising under contracts as well as other equitable interests in ships. By the 25 & 26 Vict. c. 63, s. 3, it is declared, "that the expression 'beneficial interest' whenever used in the second part of the principal Act includes interests arising under contract and other equitable interests; and the intention of the said Act is that, without prejudice to the provisions contained in the said Act for preventing notice of trusts from being entered in the register book or received by the registrar, and without prejudice to the powers of disposition and of giving receipts conferred by the said Act on registered owners and mortgagees, and without prejudice to the provisions contained in the said Act relating to the exclusion of unqualified persons from the ownership of British ships, equities may be enforced against owners and mortgagees of ships in respect of their interest therein, in the same manner as equities may be enforced against them in respect of any other personal property." Assuming an *equitable* interest only to have passed by the bill of sale, the plaintiff relies for the maintenance of this action on his possessory title. The assignees make out no answer, unless they can shew a title both *legal* and *equitable*. —He also referred to *Duncan v. Tindall* (a) and *Hughes v. Morris* (b).

*The Solicitor General* and *F. J. Smith*, in support of the rule.—The question here involved is, whether, by the passing of the 17 & 18 Vict. c. 104, the policy previously enforced during a long period of years, under successive statutes, and established by a series of judicial decisions, has been deliberately departed from. That policy was to recognize no title to British ships except that which appeared on the register. The omission of negative terms, which is the only alteration in the language employed by the legislature, will

(a) 13 C. B. 258.

(b) 2 De Gex, M. & G. 349.

not induce the Court to vary the whole scope of antecedent legislation, when the Act contains no other indication of change as regards the policy of enforcing registration. The 17 & 18 Vict. c. 104, s. 57, imperatively requires that the transferee *shall* register. Whether the assignees had registered under the 60th section before the seizure does not distinctly appear, but their title when registered related back to the act of bankruptcy. The authorities are strongly in the defendants' favour. *Boyson v. Gibson* (a) in its facts bears the closest resemblance to the present case. *The Liverpool Borough Bank v. Turner* (b), a decision of Vice Chancellor *Wood*, which, on appeal was affirmed by the Lord Chancellor (c), is an authority that since the passing of the 16 & 17 Vict. c. 104, the policy of the legislature as to registration has undergone no alteration. [*Martin, B.—The Liverpool Borough Bank v. Turner* has no bearing on the present case, since there it clearly could not have been contended that the statutory form of transfer had been adopted.] On the broader question as to registration the opinions of Vice Chancellor *Wood* and Lord *Campbell, C.*, are express that there has been no change of policy. In pronouncing judgment the Vice Chancellor said (b): "The question is whether any indication can be found of an intention to alter what had previously been the national policy with respect to shipping. I can find in the whole Act no trace of such an intention." And Lord *Campbell* in affirming the Vice Chancellor's decision, after commenting on the importance attached by the legislature to the disclosure of the ownership in British ships, said (c): "The state can only attain the desired information by the register disclosing the names of the true owners and by the register being considered by the state *the only evidence of ownership*. To acknowledge the title of a totally

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(a) 4 C. B. 121.

(b) 1 J. &amp; H. 159, 170.

(c) 2 De Gex, F. &amp; J. 502, 508.

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different set of owners from that represented in the register would, I think, be at variance with the policy and a violation of the enactments of the legislature." [*Martin, B.*—Suppose that before a reasonable time had elapsed for registration by the vendee the vendor became bankrupt.] A delay in registering is at the peril of the vendee.—As to second point, the authorities shew that a Court of equity will not recognise trusts in British ships arising out of contracts: *Hughes v. Morris* (a), and *The Liverpool Borough Bank v. Turner* (b). Moreover a mere equitable interest will not entitle the plaintiff to sue. [*Martin, B.*—The assignees must shew a legal and equitable title. If they do not, the plaintiff can sue by virtue of his possession.]—They also referred to 17 & 18 Vict. c. 104, s. 58; *Ex parte Yallop* (c); *Ex parte Matthews* (d).

POLLOCK, C. B.—We are all of opinion that the rule which has been obtained to reduce the damages to 20*l.* should be discharged. I should feel great reluctance in dissenting from the opinions of such high authorities as Lord *Campbell* and Vice Chancellor *Wood* if that were necessary. But after the decision in *The Liverpool Borough Bank v. Turner* (b) it was feared that the rights of the vendee of a ship might be defeated after he had paid the purchase money by the bankruptcy of his vendor. The legislature intervened, and by express enactment gave effect to the equities arising out of contracts. In the present case the ship was bought by the plaintiff; the price paid, and the proper documents taken to the Custom House. There the plaintiff was informed that until he came of age he could not be registered, and with this information he went away satisfied. The

(a) 2 De Gex, M. & G. 349.

(c) 15 Ves. 60.

(b) 1 J. & H. 159; and on appeal, 2 De Gex, F. & J. 502.

(d) 2 Ves. Sen. 272.

bankrupt is under these circumstances, in my opinion, a trustee for the plaintiff.

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MARTIN, B.—So far from thinking that in discharging this rule we are departing from the principle of the cases which have been cited, I consider they were correctly decided. But there are two grounds on which, in my opinion, this rule should be discharged. In the first place, apart from the provisions of the 25 & 26 Vict. c. 63, I think that, on the true construction of the 17 & 18 Vict. c. 104, the plaintiff is entitled to maintain this action. That Act requires the transfer to be by bill of sale in a prescribed form. The transfer here was by bill of sale. It was in the statutory form, and upon its execution I think the property vested; for although the plaintiff could not himself have transferred (since the person to transfer is the person on the register), yet, as against the bankrupt and his assignees, the plaintiff acquired a good legal title. It is possible that the bankrupt, or his assignees when registered, might, if they had been disposed to act dishonestly, have conferred a valid title on a bonâ fide purchaser. But that they did not do; and to do what they did, viz., resume possession themselves, they had no power.

Secondly, assuming the legal interest did not pass, the 25 & 26 Vict. c. 63, s. 3, applies. The bankrupt when he sold the barge and received the purchase money became a trustee for the plaintiff. Now a bare trust does not pass to a bankrupt's assignees, who must shew themselves entitled equitably as well as legally. But in this they fail. The plaintiff can therefore sue by virtue of his possession.

PIGOTT, B., concurred.

Rule discharged.



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Jan. 26.

WHITTAKER and others v. JACKSON et Uxor.

In trespass by A. against B. for breaking and entering A.'s land and building thereon a *wall and cornice*, the issue on the plea of *liberum tenementum* was found in B.'s favour. In a subsequent action by B.'s devisees against A. and wife, the plaintiffs declared for an injury to their reversion by the wife in pulling down part of a *wall and cornice* built on land in occupation of the plaintiffs' tenant and described as in the former action. The defendants by their plea denied that the reversion was the plaintiffs'. At the trial, the plaintiffs having put the record of the former action in

evidence, the defendants admitted that the wife had no title but her husband's, but proposed to shew that in the former action the land overhung by the cornice was not in litigation:—*Held.*—First, that the plaintiffs could not have replied to the plea by way of estoppel.

Secondly, that the record was conclusive as to the title to the land overhung by the cornice at the period to which the plea of *liberum tenementum* referred, and that the evidence tendered was rejected rightly: *Martin, B.*, dubitante.

THE first count of the declaration charged a trespass by the defendant, Mary Ann Jackson, in breaking and entering certain land of the plaintiffs, situate in the township of Blackley, in the parish of Manchester, in the county of Lancaster, abutting on the east upon land of the defendant Enoch Jackson, to wit, upon a certain passage, footway, or entry of the said defendant, and on the other sides upon other land of the plaintiffs; and in cutting away part of a wall and cornice built thereon.

The second count stated that the said defendant, M. A. Jackson, broke and entered certain other land, to wit, certain land of the same description as the land mentioned in the first count as being land of the plaintiffs, the said land then being in the occupation of a certain tenant of the plaintiffs, the reversion of and in the same land, subject to the said tenancy, then and still belonging to the plaintiffs; and the said defendant, M. A. Jackson, cut away, broke to pieces and pulled down a certain part of a certain *wall and cornice* theretofore built, and then being upon the said land so in the occupation of the said tenant of the plaintiffs, and forming the eastern wall of a certain dwelling-house in the occupation of the said tenant of the plaintiffs, the reversion of and in the same dwelling-house, subject to the said tenancy, then and still belonging to the plaintiffs; whereby

the plaintiffs' said reversion was and is greatly injured and prejudiced.

Pleas.—First, not guilty.

Second, to first count.—That the said land was not the land of the plaintiffs, as alleged.

Third, to the second count.—That the reversion of and in the said land did not belong to the plaintiffs, as alleged.—Issues thereon.

At the trial, before *Mellor*, J., at the Liverpool Summer Assizes, 1863, the following facts appeared:—The plaintiffs claimed the locus in quo as the devisees of Job Raisin, and in support of his title gave in evidence a judgment in a former action of trespass, brought in 1854, against Job Raisin by the now defendant Enoch Jackson. The declaration in that action stated that the (then) defendant broke and entered *certain land* of the (then) plaintiff situate in the township of Blackley, within the parish of Manchester, in the county of Lancaster abutting on the north and south upon land of the (then) plaintiff, on the east upon land and premises of the (then) plaintiff in the several occupations of &c., and on the west upon the land of the (then) defendant, *and built thereon a certain wall and cornice* forming the eastern wall of a certain dwelling-house (then) in the occupation of &c., and by so doing so greatly narrowed a certain passage, footway or entry of the (then) plaintiff as to render the same less useful and convenient for the purposes for which it was originally intended. The pleas to this declaration were:—First, not guilty. Secondly: that the said land was not the (then) plaintiff's as alleged. Thirdly: that the *said land* at the times of the committing of the said alleged trespasses was, and still was the land and freehold of the (then) defendant. The jury found for the then plaintiff on the first, and for the then defendant on the second and third issues; and judgment was signed for the then defendant on the 24th of April, 1856.

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Evidence was given, on the part of the plaintiffs, of the identity of the locus in quo in the two actions. It was proved that the plaintiffs were Job Raisin's devisees; that the house from the eastern wall of which the cornice had been cut away was in the occupation of the plaintiffs' tenant, and that the cornice had been cut away by order of the defendant Mary Anne. Evidence was also given that the wall and cornice had remained in the same condition since the time when they were built.

On the part of the defendants the identity of the locus in quo was not denied; and it was admitted that the defendant Mary Anne had no justification of the acts complained of except under her husband's title, and that the husband had acquired no new title since the former action. The defendants' counsel proposed to give evidence that the right to the land overhung by the cornice was never litigated in the former action, contending that the pleadings in the former action raised no issue as to that land, and that, if they did, the estoppel should here have been pleaded.

The learned Judge ruled that the defendants were estopped from shewing that so much of the passage as the cornice overhung was not the land of Job Raisin when the former action was brought, and rejected the proposed evidence as to what took place at the former trial. A verdict was thereupon entered for the plaintiffs upon the issues raised by the pleas to the second count.

*Manisty*, in Michaelmas Term, 1863, obtained a rule nisi for a new trial, on the ground that the learned Judge misdirected the jury by ruling that the defendants were estopped from giving evidence upon the issue raised by the third plea; against which

*E. James* and *C. Hutton* shewed cause. (January 19).—

First, the judgment in the former action could not have been replied here by way of estoppel. If so, the authorities establish that upon the questions in issue in that action the judgment, as between parties and privies, is conclusive in evidence. Here therefore, as between the plaintiffs and defendants, the verdict in the former action on the plea of liberum tenementum is conclusive as to the title to the land at the time to which that plea refers. The subsequent title was proved by the plaintiffs, and not controverted by the defendants. [*Martin*, B. — Is it contended that the female defendant is bound by her husband's estoppels?] The female defendant made herself privy to the record, and was concluded by it, when once it was admitted that she was not relying on any other title than her husband's. The rule that a judgment obtained in a former action between the same parties or their privies, and in which the same questions were in issue, is in pleading a bar and in evidence conclusive, is subject no doubt to the modification that it is only conclusive in evidence if there was no opportunity of pleading the estoppel: Notes to the *Duchess of Kingston's Case* (a), and *Vooght v. Winch* (b), and *Doe v. Huddart* (c), there cited. Here there was no opportunity. [*Martin*, B., referred to *Lord Feverham v. Emerson* (d).] In that case the plea to which the Court held that the estoppel might have been replied was a plea of liberum tenementum. But the trespass here is the female defendant's trespass, and her husband is only joined in the action for conformity. If by her plea the female defendant had shewn that she was relying on her husband's title the estoppel might have been replied. But under the plea of not possessed it could not be predicted that she was not setting up an independent title.

(a) 2 Smith's Lead. Cas. p. 672, 5th ed.

(c) 2 C. M. &amp; R. 316.

(b) 2 B. &amp; Ald. 662.

(d) 11 Exch. 385.

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Upon the second point, viz., that the land now in dispute was not in dispute in the former action, it is submitted that the record of the former action is decisive that the title to the land overhung by the cornice was there in issue. The maxim "*Cujus est solum, ejus est usque ad cœlum*" applies, and trespass, not case, is the appropriate remedy whether the encroachment be *on* the land or *above* it. [*Martin, B.*—The law requires that an estoppel should be certain to every intent. The question here is what the word *land* means in the original declaration.] The word *land* in the original declaration applies to the whole space covered by *wall and cornice*. If the verdict had not passed for the whole space, the issues would have been entered distributively. [*Pollock, C. B.*—Suppose the original declaration had alleged that the defendant had built an arch upon the plaintiff's land, could it be contended that the meaning of the word "land" was restricted to the space on which the abutments rested?] It clearly could not.—They also referred to *The Queen v. The Inhabitants of Haughton (a)*.

*J. H. Russell* (*Manisty* with him), in support of the rule.—The question here involved is whether it appears clearly and beyond all doubt by the record of the former action that the same matter, which is now in issue, *was* in issue in that action. For it is not sufficient that it *might* have been so: 2 Smith's Lead. Cas., 5th ed., p. 669. In *Outram v. Morewood (b)*, Lord *Ellenborough*, in delivering judgment, said, that a party is estopped as to the very issue found against him, but not as to other matters consistent therewith. Now it is consistent with the original declaration that the cornice which it mentions is not the same as the cornice mentioned in the present declaration, or that since the date of the former action the cornice has been widened. [*Chan-*

(a) 1 E. & B. 501.

(b) 3 East, 346, 362.

*well*, B. The plaintiffs gave evidence that no alteration had taken place in the state of the wall or cornice, and the defendants did not offer to contradict that evidence.] The defendants proposed to shew that in the former action the right to the land overhung by the cornice was not really in litigation. The pleadings in that action did not admit of that right being litigated. Where the encroachment is not *upon* the land, but *above* it, trespass does not lie, but an action on the case must be brought for the nuisance. Again, the trespass for which this action is brought was the female defendant's trespass, and is so laid, and as against her the record, to which she was neither party nor privy, was not conclusive. It must be conceded however that, at the trial, the defendants were not prepared with proof of any other title than the husband's.

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POLLOCK, C. B.—I am of opinion that this rule, which was obtained on the ground that at the trial evidence was improperly rejected, should be discharged. The record, which it was sought to contradict, would in my judgment have been a clear estoppel if it could have been so pleaded, but, as it could not, it was conclusive in evidence. The object of the defendants was to litigate a second time that which had been already decided, and the learned Judge being of opinion that it could not be done, rightly rejected the evidence.

MARTIN, B.—I do not differ from the judgment of the Court, first, because the doubt which I entertain may be without foundation, and, secondly, because the result of a new trial would certainly be the same. But I think there is some ground for the contention that as to the cornice there is no estoppel. The land to which the plea in the

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first action refers (construing it strictly, as the rule of law requires that estoppels should be construed,) is the land alleged in the declaration to be broken and entered. But as to the land overhung by the cornice, the plea avers nothing: and therefore as to that land there appears to me to be no estoppel.

CHANNELL, B.—I am of opinion that this rule should be discharged. The declaration, so far as is material, is the same in substance as the declaration in the former action, except that there is a change in the names of the parties, and their position as plaintiffs and defendants is reversed.

Now the ground on which this rule has been obtained is that at the trial certain evidence was improperly rejected.

First, therefore it is necessary to ascertain what that evidence was. If at the trial the Judge had rejected evidence to shew that the cornice was new, or that it had been enlarged, or that the estate of Raisin (the defendant in the former action) had not vested in the plaintiffs, I should have been of opinion that such evidence had been improperly rejected. But I do not collect that on these points the Judge excluded any evidence. He treated them as matters not in dispute between the parties. But the evidence which he did reject was evidence tendered by the defendants for the purpose of reopening a question which, as appeared by the record of the former action, had been before decided. It appears to me clear that this estoppel could not have been pleaded, and that, when by extrinsic evidence the record of the former action was made to apply to this case, it operated as matter of estoppel, and not as matter for the consideration of the jury. The declaration in the former action charges the defendant in that action with breaking and entering the land of the plaintiff, and

upon *that* land (as I read the declaration) building a wall and cornice. And the plea to that declaration is, that the said land was the land and freehold of the defendant. The plaintiffs' evidence further shewed that, with the single exception of cutting down the cornice, the same state of things had continued afterwards without any alteration. No evidence was offered by the defendants to shew that it had not. As to this part of the case therefore no question arises. But upon the point on which evidence was offered by the defendants and rejected, I am of opinion that the rejection of the evidence was right.

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PIGOTT, B.—I think this was a good estoppel. The question is what was the land really in litigation in the former action, and what land did the jury there find to be the land of the defendant? My reading of the pleadings in that action is, that the defendant there contended that not only the land on which the wall was built was his, but also the land on which the cornice was built, and that the jury so found. I think the cornice cannot be treated as a mere adjunct to the wall.

Rule discharged.

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Jan. 22. **SLEEMAN and Others v. BARRETT and Another, Executors of BENNETT.**

"Butty colliers" working in partnership under a verbal contract with the owner of a colliery, and paid by the yard and ton and sometimes by the day, and, though not allowed to underlet the work or leave it, employing others to assist them for whose wages they are responsible, are not artificers performing labour for wages within the meaning of the Truck Act, 1 & 2 Wm. 4, c. 37.

**DECLARATION** against the defendants as executors of Timothy Bennett for work done and materials provided for the testator, and on accounts stated between the plaintiffs and the testator.

Pleas :—First, never indebted. Second :—Payment. Third :—Satisfaction and discharge by the testator's delivery to the plaintiffs, and by their acceptance of divers goods. Fourth :—Satisfaction and discharge by the testator's payment of divers monies to the plaintiffs' use, and by their acceptance of such payment as a satisfaction and discharge. Fifth :—Set-off for goods sold and delivered, work done and materials provided, money lent, and money paid to the plaintiffs' use, by the testator, and on accounts stated between the plaintiffs and the testator.

At the trial, before *Channell, B.*, at the Gloucestershire Spring Assizes, 1863, the following facts appeared :—The defendants were the executors of Timothy Bennett, the owner of a colliery. The plaintiffs were four "butty colliers," working together in partnership. Prior to 1859 the defendants had worked for Bennett in his colliery for several years continuously. In 1859 they dissolved partnership. The present claim was for work done during the three years next preceding the dissolution. The agreements under which the work was done were oral, and made with the testator or his bailiff. The work, which principally consisted of making roads in the mines, and getting the coal, was paid for by the yard and by the ton; but where the nature of the work did not admit of these modes of payment it was paid for by the day.

Upon the question whether the plaintiffs worked, or were bound by their contract to work, personally, the evidence of the plaintiff Sleeman, which was not contradicted, was in substance as follows:—The plaintiffs worked themselves like ordinary workmen, and this is the practice of butty colliers. They also employed men to work under them. They were to do the work as they liked.


On cross-examination Sleeman stated that, if the work was done to the satisfaction of the bailiff, he would not care by whose hands it was done; but that the plaintiffs were not allowed to leave the work, and go to work elsewhere.

The plaintiffs understood they were not to underlet the work, though nothing to that effect had expressly passed between them and Bennett.

The mode of settlement was as follows:—Pay days were held once a month. Before pay day the defendants furnished Bennett's pay clerk with a note of the work, from which a pay bill was made out. The pay bill shewed on one side the value of the work done, and on the other side deductions for cash advanced and goods supplied by Bennett to the plaintiffs. The goods consisted of gunpowder and oil, used in the works, and also of malt meal and coal. In addition to the deductions which appeared in the pay bill, deductions were made for articles supplied to the plaintiffs and their men at a grist mill belonging to a person named Winkle, and for which Bennett paid. The invoice of these articles was produced on pay day along with the pay bill, and, after the deductions had been made which appeared by the pay bill and invoice, the plaintiffs received the balance. There was no order or contract in writing for any of the above deductions.

It was admitted by the defendants that work had been done during the three years next preceding the dissolution

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amounting in value to 1232*l.* 7*s.* 5*d.* It was admitted by the plaintiffs that they had received 516*l.* 4*s.* 8*d.* in cash, and that if all the deductions claimed by the defendants were by law allowable they could not recover.

The defendants' counsel objected that the plaintiffs were not artificers within the meaning of the 1 & 2 Wm. 4, c. 37.

By consent, a verdict was entered for the defendants subject to the opinion of the Court upon the facts and evidence, the plaintiffs to have leave to move for that purpose, and the Court to be at liberty to draw such inferences as a jury might draw.

*Huddleston*, in Easter Term, 1863, obtained a rule nisi accordingly, to enter the verdict for the plaintiffs for 1232*l.* 7*s.* 5*d.*, or such sum as the Court should direct, on the ground that, upon the evidence given and the admissions made on the trial of the cause, the plaintiffs were entitled to recover from the defendants the said sum.

*Gray* (*Gough* with him) shewed cause.—(Nov. 21, 1863, Jan. 22, 1864).—The plaintiffs are not artificers within the meaning of the 1 & 2 Wm. 4, c. 37, whether the language of the Act be regarded, or the authorities. First, as to the language of the Act. It clearly points to an artificer who is paid by *wages* for his personal labour. The first five sections shew this (*a*). They invariably refer to the

(*a*) Section 1, after reciting that "it is necessary to prohibit the payment, in certain trades, of wages in goods, or otherwise than in the current coin of the realm;" enacts: "That in all contracts hereafter to be made for the hiring of any artificer in any of the trades hereinafter enumerated, or for the performance by any

artificer of any labour in any of the said trades, the *wages of such artificer* shall be made payable in the current coin of this realm only, and not otherwise; and that if in any such contract the whole or any part of such wages shall be made payable in any manner other than in the current coin aforesaid, such contract shall be and is

wages and labour of a particular artificer. Looking at the nature and magnitude of this contract it is clear the plaintiffs were not artificers paid by wages. Part of their remuneration was profit derived from the employment of other persons. No privity existed between the defendants and the men in the employment of the plaintiffs. But as

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hereby declared illegal, null and void."

Section 2 enacts:—"That if in any contract hereafter to be made between any artificer in any of the trades hereinafter enumerated, and his employer, any provision shall be made directly or indirectly respecting the place where, or the manner in which, or the person or persons with whom, the whole or any part of the *wages due or to become due to any such artificer* shall be laid out or expended, such contract shall be and is hereby declared illegal, null and void."

Section 3 enacts:—"That the entire amount of the *wages* earned by or payable to any artificer in any of the trades hereinafter enumerated, *in respect of any labour by him done* in any such trade, shall be actually paid to such artificer in the current coin of this realm, and not otherwise; and every payment made to such artificer by his employer, of or in respect of any such wages, by the delivering to him of goods, or otherwise than in the current coin aforesaid, except as hereinafter mentioned, shall be and is hereby declared illegal, null and void."

Section 4 enacts:—"That every artificer in any of the trades hereinafter enumerated shall be

entitled to recover from his employer in any such trade, *in the manner by law provided for the recovery of servants' wages*, or by any other lawful ways and means, the whole or so much of the wages earned by such artificer in such trade as shall not have been actually paid to him by such his employer in the current coin of this realm."

Section 5 enacts:—"That in any action, suit, or other proceeding to be hereafter brought or commenced by any such artificer as aforesaid, against his employer *for the recovery of any sum of money due to any such artificer as the wages of his labour* in any of the trades hereinafter enumerated, the defendant shall not be allowed to make any set-off, nor to claim any reduction of the plaintiff's demand, by reason or in respect of any goods, wares, or merchandize had or received by the plaintiff as or on account of *his wages* or in reward for *his labour*, or by reason or in respect of any goods, wares or merchandize sold, delivered or supplied to such artificer at any shop or warehouse kept by or belonging to such employer, or in the profits of which such employer shall have any share or interest."

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between these men and the plaintiffs the Act applies. It will perhaps be argued that the interpretation of the word "wages" in the 25th section (a) extends its meaning: but the object of that section, as appears from the latter part of it, is to prevent evasions and carry out the purposes of the Act, not to give the word "wages" an unusual meaning. Moreover, whatever be the equivalent of the word "wages," that which the Act deals with is the wages of the artificer's labour.

Next with regard to the authorities. The case of *Riley v. Warden* (b), and the judgments in that case of *Parke, B.*, and *Rolfe, B.*, strongly support the defendants' argument. *Parke, B.*, said:—"It appears to me that, upon the true construction of this Act, it is to be taken as applicable to those persons only who strictly contract as *labourers*, that is, to such as enter into a contract to supply their *personal* services, and to receive payment for that service in *wages*." *Rolfe, B.*, said:—"It appears to me clear, upon looking at this act of parliament, that it applies only to those persons who are to receive *wages* as the price of their labour, and that the term 'wages' is to be understood in its popular sense, and does not include wages which are the


(a) Section 25 enacts:—" . . . that within the meaning and for the purposes of this Act, any money or other thing had or contracted to be paid, delivered, or given as a recompense, reward, or remuneration for any labour done or to be done whether within a certain time or to a certain amount, or for a time or an amount uncertain, shall be deemed and taken to be the 'wages' of such labour; and that within the meaning and for the purposes aforesaid, any agreement, under-

standing, device, contrivance, collusion, or arrangement whatsoever on the subject of wages, whether written or oral, whether direct or indirect, to which the employer and artificer are parties or are assenting, or by which they are mutually bound to each other, or whereby either of them shall have endeavoured to impose an obligation on the other of them, shall be and be deemed a 'contract.'"

(b) 2 Exch. 59.

price of a contract. The plaintiffs employed several persons under them, and in that respect differ from what is popularly understood as a "labourer." The case of *Riley v. Warden* (a) was approved and acted on by the Court of Common Pleas in *Sharman v. Sanders* (b). And in the later case of *Ingram v. Barnes*, in the Exchequer Chamber (c), both decisions were upheld. It is true that in *Weaver v. Floyd* (d), and *Bowers v. Lovekin* (e), the Court of Queen's Bench seems to have considered that an artificer who contracts to work personally may be within the Act, notwithstanding he is at liberty to employ others to work under him. But, in the first place, those decisions are not necessarily binding on this Court, as decisions of a Court of co-ordinate jurisdiction, inasmuch as no appeal lay in either case to a higher tribunal. And, in the second place, the contract here did not bind the plaintiffs to work personally. The authorities all agree that, notwithstanding the contractor's personal labour may have been in the contemplation of the parties to the contract, if it has not been made an actual term in the contract the case is not within the Act. But on the other hand the affirmative proposition that, because an artificer does contract to do some part of the work himself, he is necessarily within the Act, is on principle clearly not sustainable.—[At the conclusion of this branch of their arguments, the plaintiffs' counsel were stopped by the Court from arguing any other point.]

*Huddleston* and *H. James*, in support of the rule.—The facts proved at the trial bring the plaintiffs within the 1 & 2 Wm. 4, c. 37. They were "artificers, labourers or workmen, employed in or about the working or getting of mines of

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(a) 2 Exch. 59.

(b) 13 C. B. 166.

(c) 7 E. &amp; B. 115.

(d) 21 L. J., N. S., Q. B. 151.

(e) 6 E. &amp; B. 584.

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coal," and as such within the description in the 19th section (a) of the class of persons to whom the Act applies. And they were to be paid "wages." The 25th section (b) defines "wages" in the widest terms. It enacts "that within the meaning and for the purposes of this Act any money had or contracted to be paid, delivered, or given as a recompense, reward, or remuneration for *any labour* done or to be done, whether within a certain time or to a certain amount or for a time or amount uncertain, shall be deemed and taken to be the *wages* of such labour." Whatever sum was here payable, was payable as wages within this definition. [*Bramwell, B.*—Do you contend, bearing in

(a) Section 19 enacts:—"That nothing herein contained shall extend to any artificer, workman, or labourer, or other person engaged or employed in any manufacture, trade, or occupation, *excepting only artificers, workmen, labourers and other persons employed in the several manufactures, trades and occupations following; (that is to say), in or about the making, casting, converting, or manufacturing of iron or steel, or any parts, branches, or processes thereof; or in or about the working or getting of any mines of coal, ironstone, limestone, salt rock; or in or about the working or getting of stone, slate, or clay; or in the making or preparing of salt, bricks, tiles, or quarries; or in or about the making or manufacturing of any kinds of nails, chains, rivets, anvils, vices, spades, shovels, screws, keys, locks, bolts, hinges, or any other articles or hardwares made of iron or steel, or of iron and steel combined, or of any plated articles of cutlery, or of any goods or wares made of brass,*

*tin, lead, pewter, or other metal, or of any japanned goods or wares whatsoever; or in or about the making, spinning, throwing, twisting, doubling, winding, weaving, combing, knitting, bleaching, dyeing, printing, or otherwise preparing of any kinds of woollen, worsted, yarn, stuff, jersey, linen, fustian, cloth, serge, cotton, leather, fur, hemp, flax, mohair, or silk manufactures whatsoever, or in or about any manufactures whatsoever made of the said last mentioned materials, whether the same be or be not mixed one with another; or in or about the making or otherwise preparing, ornamenting, or finishing of any glass, porcelain, china, or earthenware whatsoever, or any parts, branches, or processes thereof, or any materials used in any of such last mentioned trades or employments; or in or about the making or preparing of bone, thread, silk, or cotton lace, or of lace made of any mixed materials."*

(b) *Antè*, p. 938.

mind the language of the first and third sections, that the whole sum was payable as *the plaintiffs' wages?*] The maxim, "Qui facit per alium, facit per se," applies. The authorities are express that the circumstance of a "butty collier" having assistance in the performance of the work will not take the case out of the statute: *Weaver v. Floyd* (a), *Bowers v. Lovekin* (b) and *Lowther v. The Earl of Radnor* (c), a decision on the 20 Geo. 2, c. 19, a statute in pari materiâ with that now under consideration. In *Weaver v. Floyd* (a), *Patteson, J.*, points out that the mode of payment being by the ton cannot affect the question, since that is only a mode of estimating the wages. There is nothing in the objection that the Act may also apply as between the plaintiffs and their assistants, since there is no reason why the Act should not have a double operation. The test to which all the authorities point is, was there a binding contract to work personally? *Ingram v. Barnes* (d) was decided in the Exchequer Chamber on that ground. Here there is ample evidence from which the Court may infer such a contract. In *Bowers v. Lovekin* (b), which closely resembles this case, the inference was drawn on less cogent evidence. The 4 Geo. 4, c. 34, empowers justices to convict and punish artificers for breaches of their contracts of service and to abate a portion of their wages. Butty colliers are uniformly dealt with under that statute: *In re Bailey* and *In re Collier* (d). [*Bramwell, B.*—The question here is, what contract was made in *this* case with *these* butty colliers? *Pollock, C. B.*—Was the contract for labour or for the result of labour? The circumstance that the contracting party engages to work personally, though it may afford a means of determining the nature of the contract, is surely not decisive

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(a) 21 L. J., N. S., Q. B. 151.

(b) 6 E. &amp; B. 584.

(c) 8 East, 113.

(d) 7 E. &amp; B. 115.

(e) 3 E. &amp; B. 607.



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on the point.] The contracting party must be a workman employed in one of the occupations which the 19th section specifies. In *Riley v. Warden* (a), and *Sharman v. Sanders* (b), the plaintiffs were not workmen, but contractors; and on that ground those cases are distinguishable.—They also referred to *Lawrence v. Todd* (c), *Blake v. Lanyon* (d), *Ex parte Ormrod* (e), and *Ex parte Gordon* (f).

POLLOCK, C. B.—We are all of opinion that the rule ought to be discharged. Where persons are employed to do certain work and are to receive wages for their labour, the contract being merely for the labour, in my judgment that is within the Truck Act. But if the contract is not for the labour, but for the result or effect of the labour, as for instance a contract for the removal of a quantity of clay, that is not within the Act, because there the contract is not for the labour but for that which the labour is to accomplish. That is the distinction which I am disposed to make between the cases which are, and those which are not within the Truck Act. I consider the law settled by *Riley v. Warden* (a), which was adopted by the Court of error in *Ingram v. Barnes* (g). I do not think the doctrine laid down by *Erle, J.*, in *Bowers v. Lovekin* (h) is correct. He there said: “I take the true construction of the Act to be, that it applies to contracts for artificers’ work to be paid for by the piece, whenever it was intended that the contractor should personally do all or part of the work as a workman, so as to make him one of the class of artificers.” It seems to me that if the nature of the contract is such that it is not a contract for labour but the result of labour, as for instance where a person contracts to execute a certain work and employs a

(a) 2 Exch. 59.

(b) 13 C. B. 166.

(c) 14 C. B., N. S. 554.

(d) 6 T. R. 221.

(e) 1 D. & L. 825.

(f) 25 L. J., N. S., M. C. 12.

(g) 7 E. & B. 115.


(h) 6 E. & B. 584.

number of workmen to assist him in doing it, the case is not within the Act although he may do a portion of the work himself. I should so decide on principle, but the authorities are in favour of that view, particularly the case of *Ingram v. Barnes*, which has settled the law on very clear and intelligible grounds.

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MARTIN, B.—I am also of opinion that the rule ought to be discharged. I adhere to the judgment of this Court in *Riley v. Warden*, which was recognised and adopted by the Court of Common Pleas in *Sharman v. Sanders*, and by the Court of Exchequer Chamber in *Ingram v. Barnes*. I think that the true construction of the Act is given by *Parke, B.*, and *Rolfe, B.*, in *Riley v. Warden*, and if there be any cases at variance with that decision I dissent from them.

BRAMWELL, B.—I agree that the rule ought to be discharged. In my opinion no person who attentively reads this act of parliament can entertain any doubt about this case. The first section says that in all contracts for the hiring of any artificer, or for the performance by any artificer of any labour, the wages of such artificer shall be made payable in the current coin of the realm only. Then the second section says that if, in any contract between any artificer and his employer, any provision shall be made respecting the place where, or the manner in which, or the person or persons with whom, the whole or any part of the wages due or to become due to any such artificer shall be laid out or expended, such contract shall be void,—therefore there must be a contract with an artificer for labour in respect of which he is to be paid wages. Can any one say that the plaintiffs were employed to do work and were to receive wages for their labour? Then the third section says that the entire amount of the wages payable to any artificer

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in respect of any labour by him done, shall be actually paid in the current coin of the realm. It is therefore manifest that unless there is a contract with an artificer for labour in respect of which he is to be paid wages, the case is not within the Act.

CHANNELL, B.—I am also of opinion that the rule ought to be discharged. It seems to me that the facts do not bring the case within the Truck Act. I should come to that conclusion looking at the Act alone and if it were now to be construed for the first time, because it is clear from the first, second and third sections that there must be a contract with an artificer for work and labour in respect of which he is to be paid wages. But I consider that *Riley v. Warden*, *Sharman v. Sanders* and *Ingram v. Barnes* dispose of this case.

Rule discharged.

Jan. 14. 22. GREGORY v. THE WEST MIDLAND RAILWAY COMPANY.

The owner of cattle, on sending them by a railway, signed a ticket stating that he thereby agreed to the following conditions of


carriage:—"1st. The Company are to be free from all risk and responsibility with respect to any loss or damage arising in the loading or unloading, from suffocation or from being trampled upon, bruised or otherwise injured in the transit, from fire, or from any other cause whatsoever, it being hereby agreed that the same is to be carried at the owner's risk." "3rd. That, as the charge for conveyance is for the use of the waggon and locomotive power, the owner or his representative is required to see to the efficiency of such waggon before he allows his stock to be placed therein, and complaint must be made in writing to the station-inspector or clerk in charge as to all alleged defects, either at the time of booking or before the waggon leaves the station."—*Held*, that these conditions were unreasonable, and void under the Railway Canal and Traffic Act, 1854.

THE first count of the declaration stated that the defendants were the owners and proprietors of the West Midland Railway, and of certain trucks and carriages used by them to carry cattle thereon for hire and reward, and the plaintiff delivered to the defendants, at their request, a cow, to be

by them safely and securely carried in the said trucks from Abergavenny to Newport, for reasonable reward in that behalf; and it became the duty of the defendants to use due and proper care and skill in and about the carriage of the cow on the said journey, and in and about the management of the said trucks: Yet the defendants so carelessly and unskilfully conducted themselves in and about the carriage of the cow and the management of the trucks, that by reason thereof the cow was greatly injured and deteriorated in value during the said journey.

Second count.—That the plaintiff employed the defendants, at their request and for hire and reward, to provide for the plaintiff a certain truck or carriage as aforesaid, to be used on the said railway for the conveyance of a cow of the plaintiff from Abergavenny to Newport by the defendants, and safely and securely to carry the cow thereon from Abergavenny to Newport, and the defendants provided the said truck and received the cow to be carried as aforesaid, and, in consideration of the said employment, promised and undertook that the truck or carriage provided by them should, at the time of their providing the same, be reasonably fit and proper for the conveyance of the cow on the said railway, and that they would safely and securely carry the cow on the said truck from Abergavenny to Newport: Yet the plaintiff avers that, although all things were done, &c., the said truck so provided by the defendants and in which the cow was carried was not, at the time of the defendants providing the same, reasonably fit or proper for the conveyance of the cow on the said railway; and the defendants did not safely or securely carry the cow in the said truck from Abergavenny to Newport, whereby the cow, whilst on the journey, was greatly injured.

Plea (inter alia) to first count.—That the cow was delivered to and was received by the defendants to be carried

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from Abergavenny to Newport, under a special contract, to wit, between the plaintiff and the defendants, then signed by the person who delivered the cow to the defendants for carriage as aforesaid, whereby the said receipt and carriage thereof were made and were subject to certain just and reasonable conditions, referred to by and embodied in the said contract, that is to say, &c. (the plea then set forth the first, third, and fourth conditions (a)): and all conditions were performed and fulfilled, and everything happened to entitle the defendants to the benefit and protection of the said special agreement and conditions; and the defendants say that the injury to and deterioration in value of the said cow, and the supposed causes of action in the first count mentioned, were not occasioned nor did the same happen or arise by the neglect or default of the defendants or their servants.

There was a similar plea to the second count.—Issues on the pleas.

At the trial, before *Byles, J.*, at the last Monmouthshire Summer Assizes, it appeared that, on the 16th March, 1863, the plaintiff sent a cow and a heifer to the Abergavenny station of the defendants' railway, to be carried from thence to Newport. The drover who brought the cattle paid 4s. 8d. for their carriage, and signed a cattle ticket specifying the rate of charge, at the foot of which were the following words:—"I hereby agree to the conditions of carriage on the back hereof." The conditions were as follows:—

" Conditions of carriage.

"The Newport, Abergavenny and Hereford Railway Company give public notice that they undertake the conveyance of horses in waggons, oxen, cows, sheep, calves or pigs, upon the terms and conditions hereafter stated, and by such only will they be bound.

(a). *Post*, p. 947.

“ First. They are to be free from all risk or responsibility with respect to any loss or damage arising in the loading or unloading, from suffocation, or being trampled upon, bruised, or otherwise injured in the transit, from fire or from any other cause whatsoever, it being hereby agreed that the same is to be carried at the owner’s risk.

“ Second. They are not to be held responsible for carriage or delivery within any certain or definite time, or in time for any particular market.


“ Third. That as the charge for conveyance is for the use of the waggon and locomotive power, the owner or his representative is required to see to the efficiency of such waggon before he allows his stock to be placed therein; and complaint must be made in writing to the station inspector, or clerk in charge, as to all alleged defects, either at the time of booking or before the waggon leaves the station.

“ Fourth. The owner or his drover shall ride free in the waggon in which his stock is loaded, and shall have the care thereof, but as no fare is charged it is agreed that such owner or driver shall so ride entirely at his own risk.

“ This ticket to be delivered up at the place of destination, in default of which the stock herein named will be detained, and remain at the owner’s risk and expense.”

The defendants’ servants put the cow and heifer, without halters, into a sheep or calf truck with low rails, and during the journey the cow jumped or fell out of the truck, and was greatly injured. The person on whose land the cow fell had some claim against the railway Company, and he killed the cow and kept the carcase for his own use. When the drover paid the carriage and signed the ticket he was told that the cow and heifer were in a truck ready to start, but he did not see either them or the truck.

It was submitted, on behalf of the defendants, that they only undertook to carry upon the terms contained in the

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conditions, and therefore were not liable. It was contended on the part of the plaintiff that the conditions were unreasonable and void. A verdict was then entered for the plaintiff for 30*l.*, to be reduced to 15*l.* if he should only be entitled to the carcase of the cow; and leave was reserved to the defendants to move to enter the verdict for them.

*H. James*, in last Michaelmas Term, obtained a rule nisi accordingly, on the ground that the plaintiff was bound by the special contract; or to reduce the damage to 15*l.*; against which

*H. Matthews* and *A. S. Hill* shewed cause (Jan. 14, 22). — It is now established that a railway Company cannot exempt themselves from liability for loss or injury to goods by a “condition,” unless it is just and reasonable and embodied in a special contract in writing, signed by the owner or sender of the goods. The first case on the subject was *Wise v. The Great Western Railway Company* (a); but that case, and also *Harrison v. The London, Brighton and South Coast Railway Company* (b), must be regarded as overruled; and the law is settled by *McManus v. The Lancashire and Yorkshire Railway Company* (c) and *Peek v. The North Staffordshire Railway Company* (d). The condition itself and not the event must be looked at, in order to ascertain whether it is reasonable. [*Martin, B.*—A condition reasonable on the face of it, when applied to a number of cases may be most unreasonable. Therefore, in order to ascertain whether a condition is reasonable or not, ought not regard to be had to all the cases to which it is applicable?] In *Peek v. The North Staffordshire Railway Company* (d), *Blackburn, J.*, expressed an opinion that it was immaterial whether the injury arose from the neglect of the Company or not,


(a) 1 H. & N. 63.

(b) 2 B. & S. 122, 152.

(c) 4 H. & N. 327.

(d) 10 H. L. 473. 514.

because the condition was either void or valid ab initio, and before the injury accrued. Here the Company, by the first condition, seek to free themselves from all risk or responsibility for loss or damage occasioned by any cause whatsoever. *McManus v. The Lancashire and Yorkshire Railway Company* is an express authority that such a condition is void. [*Bramwell*, B.—How can any case which has decided as a matter of law that a condition is unjust and unreasonable, be an authority that under totally different circumstances the condition is also unjust and unreasonable? Must not all the circumstances be looked at in order to ascertain whether a particular condition is just and reasonable?] The authorities may be referred to as shewing the construction put upon the terms of such a condition. The first condition would exempt the Company from all liability for loss or damage occasioned by their negligence however gross: *Carr v. The Lancashire and Yorkshire Railway Company* (a). That state of things, no doubt, led to the passing of the 17 & 18 Vict. c. 31, s. 7. The burden of shewing that a condition is just and reasonable lies on the railway Company: per Lord *Cranworth* in *Peek v. The North Staffordshire Railway Company* (b). The third condition does not qualify the first. The Company do not say that if complaint is made in writing, they will be liable. Moreover the third condition does not apply to this case, for the accident did not arise from any defect in the waggon, but because it was not suitable for carrying a cow. [*Martin*, B.—The condition must mean that the owner of the cattle should satisfy himself as to the efficiency of the waggon for carrying his cattle.] This condition was, no doubt, inserted in consequence of the judgment in *Shaw v. The York and North Midland Railway Company* (c). But, even assuming


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(a) 7 Exch. 707.

(b) 10 H. L. 473.

(c) 13 Q. B. 347. 353.



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that the conditions protect the Company, the plaintiff is entitled to retain his verdict for 15*l.*, because they were bound to deliver to him the cow dead or alive. The second count charges the defendants with a breach of contract in not safely and securely carrying, and that breach was proved.

*H. James*, in support of the rule.—First, it is conceded that the conditions must be just and reasonable and in writing signed by the owner of the goods, but, in order to determine whether they are just and reasonable, they must be looked at, not in the abstract, but with reference to the particular circumstances of each case. If not, why does the 7th section of the Railway and Canal Traffic Act require the Judge at the trial to determine the question, when it might have been raised by demurrer? The Company have a right to avail themselves of the knowledge and judgment of the owner of the cattle as to the efficiency of the waggon. There is no authority that because a condition is too large it is altogether void. In *McCance v. The London and North Western Railway Company* (a), Pollock, C. B., said that “the act only makes void so much of a condition as is unreasonable.” Therefore, even if the first condition is unreasonable the defendants are protected by the third. There is nothing unreasonable in the Company saying “I will lend you a waggon, but you must see to the efficiency of it and make complaint in writing of all alleged defects.” If the defect is latent, negligence must be proved. If the defect is patent, the owner of the cattle is as capable of seeing as the Company. If the defect is such as to be obvious to the owner alone, what is there unreasonable in the Company requiring his opinion? In *Pardington v. The South Wales Railway Company* (b) similar conditions were held

(a) 7 H. & N. 477, 486.

(b) 1 H. & N. 392.

reasonable.—Secondly, the plaintiff cannot recover by virtue of the contract, because he has not declared properly. There was no absolute contract safely and securely to carry, but only a qualified contract to carry subject to certain conditions. As this count is framed, the defendant could not pay money into Court without admitting the contract as therein alleged: *McCance v. The London and North Western Railway Company* (a).

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POLLOCK, C. B.—If the case of *M'Manus v. The Lancashire and Yorkshire Railway Company* (b) had been undisturbed by the Court of error, I should have thought it a direct authority in favour of the defendants; but that case has been overruled (c) upon this very point; and I consider that we are bound by the decision of the Court of error. The rule will therefore be discharged.

MARTIN, B.—I am of the same opinion. I do not depart from the view which I took of this act of parliament in delivering my opinion in the House of Lords, in the case of *Peck v. The North Staffordshire Railway Company*, which I thought was the correct view. But, looking at the decision of the Court of Exchequer Chamber in the case of *M'Manus v. The Lancashire and Yorkshire Railway Company* (c), I consider that I am bound to decide against the railway Company.

The first question is, what is the real meaning of these conditions? The railway Company “give public notice” (therefore I apprehend that these are conditions within the first proviso of the Act) “that they undertake the conveyance of horses in waggons, oxen, &c., upon the terms and conditions hereafter stated, and by such only will they be

(a) 7 H. & N. 477.

(b) 2 H. & N. 693.

(c) 4 H. & N. 327.


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bound; first, they are to be free from all risk or responsibility with respect to any loss or damage arising in the loading or unloading, from suffocation, or from being trampled upon, bruised, or otherwise injured in the transit, from fire, or from any other cause whatsoever, it being hereby agreed that the same is to be carried at the owner's risk." It seems to me impossible for words to express more clearly that the Company, so far as their will is concerned, are not to be responsible for any sort of loss or damage occurring from the commencement of the loading to the end of the journey. Then observe the mode in which they express themselves with respect to the waggons, "we will not be responsible for any damage arising from any defect in the waggon or locomotive power; but we require the owner to see to the efficiency of such waggon before he allows his stock to be placed therein." Reading the first and third conditions together, they seem to me to express as plainly as language can do the will of the railway Company not to be liable for any loss or damage whatever to cattle; and they declare as the reason, "we make no charge for the conveyance but only for the use of the waggon and locomotive power."

It remains to consider whether these conditions, or special contract, are reasonable. Here the words are, not "subject to the owner's undertaking all risks of conveyance, loading and unloading whatsoever," as in *M'Manus v. The Lancashire and Yorkshire Railway Company*, but "it being hereby agreed that the same is to be carried at the owner's risk." I am, however, unable to distinguish this case from that; and taking the conditions together, as I am bound to do, they provide for the complete exemption of the Company from all responsibility whatever, which that case has decided is unreasonable, and are therefore void. In my judgment this case is governed by *M'Manus v. The Lancashire and Yorkshire Railway Company*, from which we cannot depart.

BRAMWELL, B.—I am of the same opinion. The House of Lords has decided that a particular contract, no matter under what circumstances it is made, may be reviewed by the Judge before whom any question relating to it is tried, and he is to determine whether it is just and reasonable. I confess I cannot understand that, nor do I very well see how it is to be applied. I am at a loss to comprehend how anyone can determine whether a general condition with reference to all mankind, or a bargain which any two people are content to make, is reasonable or not. However the question is now set at rest, and we have some rule to act upon. It is established that as a matter of law the Courts may decide whether particular conditions are just and reasonable. Therefore we ought to see whether the conditions in question are just and reasonable. Now, though we may not agree with the Court of error in the reasons for their decision, we are bound by it, and it is sufficient to say that this case must be decided in conformity with the case of *M'Manus v. The Lancashire and Yorkshire Railway Company*, and consequently we must hold that the first condition is neither just or reasonable. It seems to me, however, that it would be far better to let people judge for themselves, and I should have thought that no condition was void which a person was willing to agree to.

It is difficult to understand the third condition; but I cannot help thinking that its right interpretation is, that it supplements the first condition: whereas that condition extended to all other dangers and perils of the journey, the third requires the sender of the cattle is "to see to the efficiency of the waggon;" but no consequence is attached to his not doing so. It seems to me that the words are used as in common parlance: "You are to see to the efficiency of the waggon, for that is your affair." If that be so, it is as unlimited with reference to the subject-matter with which

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it deals as the first condition, which has been held to be unreasonable; and so, by parity of reasoning, I presume this third condition would be held by a Court of error to be unreasonable, and therefore I now so hold it.

CHANNELL, B.—I am also of opinion that the rule ought to be discharged. Whether the first and third conditions be read as one or separate conditions, they are unreasonable. I think the construction put upon them is correct; and so construing them the case is governed by *M'Manus v. The Lancashire and Yorkshire Railway Company* and *Peck v. The North Staffordshire Railway Company*.

Rule discharged.

Jan. 13.

SICHEL v. BORCH.

The defendant, a merchant residing in Norway, and not being a British subject, drew, indorsed and sent in a letter by post to a merchant in London a bill of exchange payable in London, and which was indorsed to the plaintiff and dishonoured.—  
*Held*, that there was no cause of action which arose within the jurisdiction of the superior Courts, nor the breach of a contract made within their jurisdiction, and consequently the plaintiff could not proceed against the defendant under the 19th section of the Common Law Procedure Act, 1852: Per *Pollock*, C. B., and *Martin*, B. *Pigott*, B., dubitante.

THIS was an action by the plaintiff as indorsee against the defendant as indorser of the following bill of exchange:—

“For 256*l.* 8*s.* 5*d.* sterling.

“Drammen, 15 Nov. 1862.

“At four months date pay this first of exchange (second unpaid) to the order of myself, two hundred fifty-six pounds eight shillings five pence sterling value in myself, and place it to account for cargo ex the “Haabet” as advised by

“Jacob Borch.

“To Messrs. C. Kirkup & Co., Sunderland, payable London.”

The defendant, who was a native of Norway and not a British subject, resided and carried on business as a mer-

chant at Drammen, in Norway, where he drew the bill and indorsed it thus:—

“ Order Messrs. Henry Dresser & Co., value in account.  
“ Jacob Borch.”

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The defendant sent the bill so indorsed, by post, in a letter written by him to Messrs. Dresser and Co., and addressed to them in the city of London; and Messrs. Dresser and Co. indorsed the bill to the plaintiff, in the city of London, for value and before it was due.

On the 19th of November, 1863, the defendant was served at Drammen with notice that this action had been commenced against him by writ of summons, under the 19th section of the Common Law Procedure Act, 1852.

An application had been made to *Channell, B.*, at Chambers, to set aside the service of the notice, and he referred the matter to the Court.

Sir *G. Honyman* now moved for a rule to set aside the service of the notice of the writ of summons, on the ground that the defendant resided out of the jurisdiction of this Court and was not a British subject, and that there was no cause of action which arose within the jurisdiction.—The question depends on the construction of the 18th and 19th sections of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76). The 18th provides for the commencement of an action against a British subject residing out of the jurisdiction of the superior Courts, except in Scotland or Ireland; and it enables “the Court or a Judge, upon being satisfied by affidavit that there is a *cause of action which arose within the jurisdiction*, or in respect of the breach of a *contract made within the jurisdiction*, and that the writ was personally served upon the defendant, or that reasonable efforts were made to effect personal service thereof upon the defendant, and that it came to his knowledge,” &c., to direct that the plaintiff shall be at liberty to proceed in the

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action. The 19th section provides for the commencement of an action against a person residing out of the jurisdiction of the superior Courts, and not being a British subject, in which case notice of the writ, not the writ itself, must be served on the defendant; "and by leave of the Court or a Judge, upon their or his being *satisfied by affidavit as aforesaid*, the like proceedings may be had and taken thereupon." Here there is no cause of action which arose within the jurisdiction, nor a breach of any contract made within the jurisdiction.

*Garth* shewed cause in the first instance.—There was a contract and a breach of it at the time the bill became due. It was payable in London, and the contract was not complete until it was delivered to the plaintiff in London: *Buckley v. Hann (a)*. The post was the agent of the defendant for the delivery of the bill. Suppose the letter had been lost on its passage, and any proceedings could have been taken against the post-office authorities, could they have been in the name of the persons to whom the letter was addressed? [*Martin, B.*—The *whole* cause of action must arise within the jurisdiction.] The contract which an indorser enters into arises from his indorsement, and there is no complete transfer by indorsement until delivery to the indorsee: *Marston v. Allen (b)*. [*Martin, B.*—The contract was completed by delivery when the letter was put in the post, for the indorser lost all controul over it.] It is submitted that there could be no contract until there was an acceptance of the bill by the indorsee. [*Pollock, C. B.*—The writing on the back of the bill in Norway was an essential part of the transaction.] There is no presumption of law that the indorsees would accept the bill until they had an opportunity of inspecting it.

(a) 5 Exch. 43.

(b) 8 M. &amp; W. 494.

[*Pollock*, C. B.—The contract was commenced in Norway and consummated in London, so that it was not made either in the one place or the other.]

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Sir *G. Honyman*, in reply.—Where a debtor remits his creditor a bill of exchange by post, and the bill is lost or stolen, the loss will fall on the creditor: *Byles on Bills*, p. 354, 8th ed. Delivery to a postman of a letter addressed to a creditor and containing a bill of exchange is a delivery of the bill to the creditor: *Rex v. Lambton (a)*.

POLLOCK, C. B.—We are all of opinion that the rule ought to be absolute. This statute has altered the common law; and although we are bound to give effect to the intention of the legislature when clearly expressed, yet, where a new statute introduces a variation of procedure at common law, we ought to extend it no further than it is reasonable to suppose that the legislature intended. I think, where foreigners are made amenable to English law respecting which they know nothing, and to the jurisdiction of the Courts of a country in which they have never resided, and are liable to be served in their own country with notice that English process has issued requiring them to enter an appearance here, before we allow proceedings to be taken against them we ought to be satisfied that the legislature intended that the statute should apply to the particular case. It has been laid down in an analogous matter that the term “cause of action” means the *whole* cause of action. Here the cause of action is the contract and the breach of it. It does not follow that because the breach of contract took place in this country the cause of action arose within the jurisdiction of the superior Courts. We must take into consideration the contract of which there

(a) 5 Price, 428.



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has been a breach. The contract, strictly speaking, was neither in Norway nor England. No doubt, so far as one of the parties is concerned, it was in England, but so far as the other party is concerned it was in Norway; therefore it was in neither one country nor the other. For these reasons it appears to me that the statute does not apply to this case, and that the rule ought to be absolute.

MARTIN, B.—I am of the same opinion. The question depends on the construction of the 18th section of the Common Law Procedure Act, 1852, which authorizes the Court or a Judge, “upon being satisfied by affidavit that there is a cause of action which arose within the jurisdiction, or in respect of the breach of a contract made within the jurisdiction,” to allow the plaintiff to proceed against a person out of the jurisdiction. Here the plaintiff is suing a foreigner under the 19th section, “and by leave of a Court or Judge, upon their or his *being satisfied by affidavit as aforesaid*,” the like proceedings may be taken.

Now the first question is, does the cause of action arise within the jurisdiction? The “cause of action” means the *whole* cause of action; and includes the drawing and indorsement of the name of the drawer on the bill, both of which took place in Norway. Therefore the whole cause of action did not arise within the jurisdiction? Then was there a breach of a contract made within the jurisdiction? The contract was not made within the jurisdiction, but on the contrary in Norway; and, having been made there, a breach of it here is not within the operation of this act of parliament. Therefore it seems to me that this case is not within the language of the Act, and it is certainly not within its spirit, for a foreigner can owe no allegiance to the law of England who did nothing more than enter into some mercantile transaction in respect of which he drew a bill abroad.

PIGOTT, B.—I confess I entertain some doubt by reason of the language of the Act, which makes a distinction between a cause of action which arose within the jurisdiction and the breach of a contract made within the jurisdiction. I also find it stated, in Lloyd on County Courts, that “if a contract be made in one district which by its terms is to be performed in another, an action for the breach of such contract may be said to be for a cause of action arising wholly in the said last mentioned district; and it has been held that the venue in such a case might be changed on the ordinary affidavit that the cause of action arose in such district” (referring to *Mondel v. Steele* (a)). However I am not disposed to differ from the other members of the Court. Still I think that we ought not to restrict this act of parliament. It is a remedial Act; and, although it may be a hardship to compel a foreigner to come to this country to defend an action on a bill of exchange drawn and indorsed abroad, it should be borne in mind that he has in some sense come here and obtained an English merchant’s goods: he has made a contract, and had the benefit of it, in England; and an English merchant is complaining that he has not been paid. It would be a greater hardship on the plaintiff if he should be obliged to go to Norway to obtain his money, instead of the defendant coming here to give some reason for not paying it. It seems to me that where the breach of contract has occurred, there the remedy might well be.

Rule absolute.

(a) 8 M. & W. 640.

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Jan. 28.

IRWIN v. WILLIAM BRANDWOOD and JANE his Wife.

Words impu-  
ting to a  
certificated  
master mariner  
drunkenness  
whilst in  
command of  
a vessel at sea,  
are actionable  
without special  
damage.

**DECLARATION.**—That, before the speaking of the words hereinafter mentioned, the plaintiff had duly obtained such certificate of competency as is required by the “Merchant Shipping Act, 1854,” to be obtained by persons intending to become masters of foreign-going ships, and, possessing the said certificate, commanded a ship or vessel called the “Nelson,” being a foreign-going ship within the meaning of the said Act, as the master of the said ship for hire and wages payable to him in that behalf, during a foreign voyage, in the course of which the said vessel sailed to and stayed at Nassau, within her Majesty’s dominions in the West Indies, under the command of the plaintiff as such master as aforesaid; and at the time of the speaking of the said words the plaintiff still retained such certificate as aforesaid, and exercised the employment or profession of a certificated master mariner, and sought his livelihood thereby: Yet the defendant Jane, then being the wife of the defendant William, falsely and maliciously spoke and published of the plaintiff, as such master mariner as aforesaid, the words following, that is to say:—“During his stay at Nassau he was frequently drunk, and in that state he had to be carried to his boat to reach his vessel, which was standing out several miles” (meaning that the plaintiff, whilst he was master of the said ship or vessel as aforesaid, contrary to his duty as master of the said ship or vessel, during the stay of the said ship or vessel at Nassau, had been frequently drunk, and had been guilty of a gross act of drunkenness): whereby the plaintiff’s character and reputation as a master mariner as aforesaid have been injured, and the

plaintiffs' said certificate became liable to be suspended or cancelled if the said charge had been true.

Demurrer, and joinder therein.

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*Baylis* argued in support of the demurrer (Jan. 25) (a). —Words imputing drunkenness to a master mariner are not actionable without special damage. In *Ayre v. Craven* (b), Lord Denman, in delivering the judgment of the Court, said:—"There are obvious and very good reasons for the jealousy with which the Courts have always regarded actions of slander, particularly those in which no indictable offence has been imputed." [*Martin*, B.—Suppose it was said of a coachman that he was habitually drunk. *Pigott*, B.—Or that he was drunk when about to mount the box.] Words spoken of a person in his office are not actionable, unless they are spoken of him with reference to his character and conduct in such office, and impute to him the want of some qualification for or misconduct in his office: *Lumby v. Allday* (c). "The Merchant Shipping Act, 1854" (17 & 18 Vict. c. 104), s. 239 (d), only speaks of the drunkenness of a master whilst engaged in the performance of his duties. [*Pigott*, B.—Must we not assume that when he got on board the vessel he would be in command?] There

(a) Before *Pollock*, C. B., *Martin*, B., *Channell*, B., and *Pigott*, B.

(b) 2 A. & E. 2.

(c) 1 C. & J. 301.

(d) Sect. 239:—"Any master of or any seaman or apprentice belonging to any *British* ship who by wilful breach of duty, or by neglect of duty, or by reason of drunkenness, does any act tending to the immediate loss, destruction, or serious damage of such ship, or tending immediately to endanger the life or limb of any person belonging to or on board

of such ship, or who by wilful breach of duty, or by neglect of duty, or by reason of drunkenness, refuses or omits to do any lawful act proper and requisite to be done by him for preserving such ship from immediate loss, destruction, or serious damage, or for preserving any person belonging to or on board of such ship from immediate danger to life or limb, shall for every such offence be deemed guilty of a misdemeanor."

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is no imputation of drunkenness on board the ship. The words must necessarily tend to injure him in his employment. As in the case of a clergyman, no action will lie for a verbal imputation of incontinence unless he is beneficed or holds some clerical office or employment of profit: *Gallwey v. Marshall* (a).

*Day, contra.*—The declaration contains a sufficient allegation that the words were spoken of the plaintiff whilst in the discharge of his duty as master; for it states that the vessel sailed to and stayed at Nassau under the command of the plaintiff as such master. In one sense the captain of a ship is as much in command whilst on shore as on board of her. It would be actionable to impute to the driver of a stage-coach that he left it outside a public house whilst he was drunk within: for although not upon the box he would be in charge of the coach. A master mariner is within the rule laid down in *Starkie on Libel*, p. 126, 2nd ed., as to words spoken of men in their profession or employment by which they gain their livelihood. In *Gallwey v. Marshall* (a) the plaintiff had no office or employment of temporal profit which could be affected by the slander; and in that respect the case differs from *Pemberton v. Colls* (b). Here the slander tends to prejudice the plaintiff in his employment, for by the 242nd section of the Merchant Shipping Act, 1854, the Board of Trade may suspend or cancel the certificate of a master if, upon investigation, he is reported to have been guilty of drunkenness. In *Starkie on Libel*, p. 130, 2nd ed., it is said:—"The only question arising upon this point seems to be this: Do the words in any degree prejudice the plaintiff in his office, profession, or employment? If they do they are actionable: the quantum of damage being a mere question of fact for the consideration of the jury."

(a) 9 Exch. 294.

(b) 10 Q. B. 461.

*Baylis*, in reply.—Reading the 242nd section of the Merchant Shipping Act, 1854, in connection with the 239th, drunkenness is not an offence within the Act unless it tends to the loss or damage of the ship, or endangers the life or limb of persons on board. A jury may find that words which are *prima facie* actionable were not spoken in a slanderous sense, but they cannot make words actionable which are not so in point of law. [*Channell*, B.—If words are actionable *per se*, no innuendo is wanted. If they are not actionable an innuendo cannot make them so. But there is an intermediate case, viz., where they may or may not be actionable, and then it is for the jury to say in what sense they were spoken. *Pollock*, C. B.—In *Wetherhead v. Armitage* (a), it was held not actionable, without special damage, to say of a woman who taught young women to dance, “She is as much a man as I am; she got J. S. with child; she is an hermaphrodite.”] That case is an authority that the slander must directly affect the plaintiff in his employment.

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*Cur. adv. vult.*

POLLOCK, C. B. now said.—This was an action for slander uttered by the defendant's wife, who imputed drunkenness to the plaintiff, a certificated master mariner, while in command of a vessel at sea in the West Indies. We are all of opinion that such words spoken of the plaintiff, while the master and in command of the vessel, are actionable without special damage. Therefore the judgment of the Court will be for the plaintiff.

Judgment for the plaintiff.

(a) 2 Lev. 233.

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Jan. 27.

STURGIS, Provisional Assignee of BROWN, an Insolvent Debtor, *v.* EVANS.

The provisional assignee of an insolvent debtor may sell his reversionary interests without an order of the Court, under the 42nd section of the 1 & 2 Vict. c. 110.

**T**HE first count of the declaration (in substance) stated that the plaintiff, as provisional assignee of C. Brown, an insolvent debtor, on the 1st November, 1861, caused to be put up for sale by auction certain lots, and amongst others, lot 1, comprising certain property, that is to say, the share of the insolvent, expectant on the death of his mother, in a sum of 1105*l.* 1*s.* 7*d.* consols, subject to certain conditions of sale; (inter alia), that the highest bidder should be the purchaser; that every purchaser should pay a deposit of 20*l.* per cent. and sign an agreement for payment of the remainder on the 22nd day of November then instant: that if the purchaser failed to comply with the said conditions the deposit should be forfeited, the vendor might resell the property, and that any deficiency in price, with expenses of resale, should be made good by the defaulter, and in case of nonpayment should be recoverable as liquidated damages.—Averments: that the defendant was the highest bidder for lot 1, and purchased the property comprised therein from the plaintiff as such assignee, and the plaintiff as such assignee sold the same to the defendant for 85*l.*, subject to the said conditions of sale; that the defendant paid the deposit, and all things happened to entitle the plaintiff as assignee to maintain this action; yet the defendant did not pay the remainder of the purchase money or complete the purchase.—The declaration then proceeded to state that the plaintiff resold the property, that there was a deficiency in the price upon such resale, that expenses were incurred, and that the defendant had not paid the amount.

There was a similar count in respect of lot 3, which comprised the share and interest of the insolvent, expectant on the death of his mother, in an annuity of 70*l*.

Plea.—That the Court for the relief of insolvent debtors of England did not, nor did the Court of Bankruptcy, order the plaintiff to sell or dispose of the said properties, or any or either of them.

Demurrer to plea, and joinder therein.

*Montague Smith* (*Paterson* with him), in support of the demurrer.—The plea is bad, for by the 1 & 2 Vict. c. 110, s. 37, upon an insolvent debtor filing his petition for discharge from custody, all his real and personal estate (with some few exceptions) vests in the provisional assignee, who has a right to sell under the title so required. The plea is framed upon the 42nd section, which authorizes the provisional assignee to take possession of the real and personal estate vested in him; “and, *if the Court shall so order*, to sell or otherwise dispose of such goods, chattels and personal estate, or any part thereof, and of the real estate” &c.; and the “provisional assignee may sue in his own name, if the Court shall so order,” for recovering debts and enforcing rights of the insolvent. That section only applies to real and personal estate of which actual possession can be taken. Where goods are in the possession, order, and disposition of a bankrupt as reputed owner, an order of the Court is necessary to vest the property in the goods in his assignees: *Heslop v. Baker* (*a*). But in that case the order confers the title; in the case of an insolvent debtor, the provisional assignee acquires a title by virtue of the 37th section, and the language of the 42nd is only affirmative of his right: *Dance v. Wyatt* (*b*). The circumstance of an action having been brought by the assignees of a bankrupt without obtain-

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(*a*) 6 Exch. 740.

(*b*) 6 Bing. 486.



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ing the leave of the Court of Bankruptcy, pursuant to the 12 & 13 Vict. c. 106, s. 153, gives the Court in which the action is brought no power to stay the proceedings; nor can the absence of such leave be pleaded as a defence to the action, for the obtaining it is a matter only between the assignees and the Court of Bankruptcy, not at all between the assignees and the other party to the suit: *Lee v. Sangster* (a). In *Doe d. Phillips v. Evans* (b), it was held that the provisions in the 7th section of the 1 Geo. 4, c. 119, with respect to the mode of conducting the sale of the insolvent's estate, were directory only.

*Prentice*, in support of the rule.—The nature of the properties sold is such that the provisional assignee is not in a condition to convey an indefeasible title without an order of the Court under the 42nd section. The 37th section vests the real and personal estate of the insolvent in the provisional assignee as a trustee for the creditors, but he cannot dispose of it without an order of the Court. The 48th section shews that a reversionary interest, or an annuity, does not vest in the provisional assignee without an order, for it recites, "And whereas persons whose estates may by an order under this Act have been vested in the said provisional assignee, may be entitled to annuities for their own lives, or other uncertain interests, or to reversionary or contingent interests," &c. *Lee v. Sangster* (a) was an action for a debt due to the bankrupt, and which vested in his assignees, so that they had a right to sue for it, but here the provisional assignee is seeking to recover damages for the non-performance of a contract of sale; and his right to maintain the action depends on whether he is in a condition to confer a good title. Where a trustee has only power to sell the trust property with the consent of the cestui que trust,

(a) 2 C. B., N. S. 1.

(b) 1 C. &amp; M. 450.

it would be a good answer to an action for not completing the purchase, that the consent of the cestui qui trust to the sale was never obtained. A vendor is bound to make a good title both at law and in equity: *Maberley v. Robins* (a), and *Elliott v. Edwards* (b). [*Martin, B.*—The power given to the Court by the 48th section is to interfere for the protection of insolvents.] The property mentioned in that section cannot be sold without an order of the Court, even assuming that other property may. When the consent of any person is required to the execution of a power, that, like every other condition, must be strictly complied with; Sugden on Powers, ch. 7, s. 5, p. 252, 8th ed. Without an order under the 42nd section, the defendant would acquire no title in equity, and a Court of equity would not decree a specific performance.

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*Montague Smith* was not called upon to reply.

POLLOCK, C. B.—We are all of opinion that an order of the Insolvent Court is not necessary to enable the provisional assignee to sell this property. If, indeed, a purchaser, before the completion of his purchase, required an order of the Court authorizing the sale of property of this kind, and the Court refused to make one, there might be some weight in the objection. But this property having vested in the provisional assignee, under the 37th section, he has a *primâ facie* right to sell it. The meaning of the 48th section is this: whereas the immediate sale of uncertain interests, or reversionary or contingent interests, may be very prejudicial to insolvents, and deprive them of the means of subsistence after payment of their debts, the Court may in their discretion give such directions respecting the sale or mortgage of such property as may seem to

(a) 5 Taunt. 625.

(b) 3 Bos. & P. 181.

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them reasonable. That does not interfere with the assignee's power to sell the property where no such direction is given respecting it. It seems to me that the authorities cited by Mr. *Smith* shew that the plea is bad, and therefore our judgment will be for the plaintiff.

MARTIN, B.—I am of the same opinion. The question entirely depends on the construction of the 42nd section, and the 48th has no bearing upon it. In the case of *Lee v. Sangster (a)*, the Court of Common Pleas put a construction on the 153rd section of the 12 & 13 Vict. c. 106, which enables the assignees of a bankrupt with leave of the Court, *but not otherwise*, to commence, prosecute, and defend actions; and I think that decision governs this. If an order is not a condition precedent to bringing an action, I see no reason why we should hold it a condition precedent to a sale. Possibly, if an application had been made to the Court for an order and refused, the assignee would not be justified in selling; but that is not the case here. The 48th section has no reference to a purchaser, its object is the protection of the property of the insolvent.

CHANNELL, B.—I am also of the opinion that the plaintiff is entitled to judgment. The objection raised by the plea is, that the plaintiff cannot make a good title to the property which he sold. I think that objection cannot prevail. If the plea had stated that before the sale to the defendant the Court made an order, under the 48th section, that the property should not be sold, I am not prepared to say that would not have been a valid defence. But the plea only states that no order for the sale of the property was made. Nor was any necessary. By the 37th section all the real and personal estate and effects of an insolvent

(a) 2 C. B., N. S. 1.

(with some few exceptions) vest in the provisional assignee for the sale and distributions of the produce amongst his creditors, and I think that the 42nd and 48th sections do not shew that he has no power to sell the property without an order of the Court. I agree in the construction put upon the 42nd section. With respect to the 48th, it does not affect the right of the assignee to sell the property vested in him, but he has no authority to mortgage without an order of the Court.

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PIGOTT, B.—I am of the same opinion. I think that the Court would not make an order under the 48th section after the property had been sold by the assignee; and therefore practically it does not vitiate the title of the purchaser.

Judgment for the plaintiff.



In re the Parties to the Marriage Settlement of ANN Feb. 1.  
ALSAGER and P. E. GUIDICI, Appellants, and THE  
COMMISSIONERS OF INLAND REVENUE, Respondents.

CASE stated by the Commissioners of Inland Revenue, under the 13 & 14 Vict. c. 97:—

By indenture, bearing date the 15th December, 1862, and made between Ann Alsager of the first part, Paolo Emiliani Guidici of the second part, and Arthur Pritchard, Francis Pritchard and Frederick Pritchard of the third part.

The 13 & 14  
Vict. c. 97,  
Sched. tit.  
"Settlement,"  
imposes an ad  
valorem duty  
on any deed  
or instrument  
whereby any  
"definite and  
certain prin-  
cipal sum or

sums of money, or any *definite and certain* share or shares in any of the government or parliamentary stocks or funds," shall be settled upon or for the benefit of any person.—*Held*, that, under that enactment, a marriage settlement was chargeable with ad valorem duty in respect of Brazilian Bonds, New Brunswick Bonds, Nova Scotia Bonds, Scrip Peruvian Loan, Chilian Bonds, Mexican Remanet Bonds, and Indian 5½. per Cents., created by statute after the 13 & 14 Vict. c. 97 passed.

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containing the following recitals:—That a marriage was intended to be had between the parties of the first and second parts. That the said Ann Alsager was entitled in fee simple to a messuage and hereditaments at High Bank, Tonbridge, and to a messuage and hereditaments, No. 14, George Street, Mansion House, in the city of London, and also to the following stock, bonds, &c.:—3800*l.* New 3*l.* per cent. Annuities; 3446*l.* 10*s.* 9*d.*, 3*l.* per cent. Reduced Bank Annuities; 400*l.* Indian 5*l.* per cent. Stock; 130 Globe Insurance shares of 100*l.* each, all paid up; four shares in the Imperial Fire Insurance Company of 500*l.* each, 50*l.* paid up; 5400*l.*, 4*l.* 10*s.* per cent. Brazilian Bonds (*a*);

(*a*) The Brazilian Bonds were in the form of a deed-poll, reciting a series of decrees by the Emperor of the Brazils, by which he was authorized to raise a loan of money for the Pernambuco railway, and other purposes, and that a loan had been raised as contracted in the city of London, amounting to the sum of 1,210,000*l.* sterling, to be represented by 1,373,000*l.* stock, bearing interest at 4*l.* 10*s.* sterling per annum for each 100*l.* stock, &c. It then proceeds thus:—“I, the undersigned Commandeur Francesco Ignacio de Carvalho Moreira, do by these presents, and in the name and on behalf of his Imperial Majesty, hereby solemnly pledge his imperial and sacred word for the strict and due fulfilment of the several provisions hereinafter contained.” 1. “Certificates payable to bearer, carrying interest at the rate of 4*l.* 10*s.* per cent. per annum, will be issued.” Then a sinking fund is to be created, and if they are

not redeemed, they are to be paid off at par. At the end there was this certificate:—“I, the above-named Commandeur Francesco Ignacio de Carvalho Moreira, do hereby certify that the bearer hereof is entitled to 100*l.* stock in the loan secured by the general agreement, of which a copy is above. I have, in consequence, granted the special certificate for 100*l.* stock, with the sixty warrants for interest appertaining thereto, full value having been paid for the same to the Imperial Brazilian Government.”

The Nova Scotia Bonds, which were under the signature of the Governor of Nova Scotia and the Receiver General of the province, were in the following form:—“Under the authority of Parliament of the province of Nova Scotia.

“The Government of Nova Scotia promise to pay to the bearer the sum of 100*l.* sterling, twenty years from and after the 18th July, 1855, likewise the in-

**3300*l.*, New Brunswick Bonds; 1500*l.*, Nova Scotia Bonds; 5000*l.* fully paid up Scrip Peruvian Loan Con-**

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terest thereon from the same date, at the rate 6*l.* per cent. per annum, to be paid half-yearly, on presentation of the proper coupons for the same, as hereunto annexed, on the 1st day of January and 1st day of July in each year, at the office of Messrs. Baring and Co., London. For the performance of all which the faith and credit of the province of Nova Scotia are hereby irrevocably pledged, as this debenture is issued in pursuance, and under the provisions, of an act of the parliament of the said province."

The New Brunswick Bonds were in a similar form.

The scrip of the Peruvian loan, after reciting that Messrs. Heywood, Kennards & Co. have been authorized to raise a loan of 5,500,000*l.*, and that they do so at the rate of 93*l.* for each 100*l.* stock, declares that they issue a certificate representing 100*l.* stock, in consideration of the payment of the sum of 93*l.*; and for that they hypothecate all the guano sent over from Peru to England or Belgium. Article 20.—"A general document or bond, containing the conditions herein contained, shall be signed by the said Minister Plenipotentiary, and countersigned by the said Messrs. Heywood, Kennards & Co., and shall be deposited, in their presence, in the Bank of England, where it shall remain until the whole debt shall have been redeemed."

"Every bondholder shall possess

a part of the loan in the terms expressed in the general document or bond, and enjoy for the amount of the nominal principal of the bond, all the rights, guarantees, and immunities stipulated in the said general document, with respect to the whole." Then follows a certificate that "the Government of the Republic of Peru is indebted to the holder of this special bond in the sum of 100*l.*, and he possesses a part in the present loan, in the very terms expressed in the general document."

The Chilian Bonds were in the following form:—

"Bond 100*l.* No. — 1000*l.* sterling.

Republic of Chili Six per cent. Loan, 1842. Secured by a general mortgage bond, of which the following is a copy:—"Don Francesco Xavier Rosales, Chargé d'Affaires of the Republic of Chili in France.—Whereas a loan of one million sterling was raised in London, in or about the year 1822, for the service of the State of Chili, I, the said Don Francesco Xavier Rosales, by virtue of the full and special power and authority to me granted by his Excellency Don Manuel Bulnes, President of the said Republic, and of all other powers and authorities in me vested, do hereby, on behalf and in the name of the said Republic of Chili, declare," &c. (It then stated that a certain series of bonds should be issued).

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solidation, 1862; 4300*l.*, Canada 5*l.* per cent. Government Bonds; 28,000 Florins, Dutch 4*l.* per cent. Certificates; 800 Chilian 6*l.* per cent. Bonds; and Mexican Remanets of the value of 50*l.* And also to certain household furniture, plate, linen, china, jewels, books, horses and carriages; and also other personal chattels and paraphernalia, to be included in the inventory thereof, to be forthwith made and signed by several parties:—In consideration of the said marriage, Ann Alsager, with the privity of the said

“All the revenues of the State of Chili are hereby declared to be mortgaged and pledged for the payment in the manner herein mentioned of both principal and interest of the bonds of this series.” (It then provided that a sinking fund was to be created for the payment of the bonds.)

“If on the 30th September, 1869, any of the said special bonds shall remain unredeemed by the sinking fund, the Government of the said State of Chili shall then pay off all such bonds at par.” After reciting that instrument, it proceeded thus:—  
“Now, therefore, be it known to all men, that I, the said Don Francesco Xavier Rosales, in my capacity of envoy as aforesaid, and in the name and on behalf of the said Republic of Chili, bind the said State of Chili to perform faithfully and truly all the foregoing engagements. In witness whereof, I, the said Don Francesco Xavier Rosales, as such envoy as aforesaid, have signed these presents, and have affixed thereto my seal of office.” At the end were these words:—“I, the above-named Don Francesco Xavier Rosales, hereby certify, that the

bearer hereby is entitled to the sum of 100*l.* sterling, part of the loan secured by the general mortgage bond deposited in the Bank of England, of which the foregoing is a copy; and I hereby declare this to be a special bond of the said loan for 100*l.* sterling, bearing an interest of 6*l.* per cent. per annum, payable half-yearly on presentation of the dividend warrants hereto annexed. Signed and sealed with my seal of office.”

The Mexican Remanet Bonds were in the following form:—

“Mexican Consolidated Stock, 1846.

“Bond, Letter A., No. 13555, for 100*l.*

“This receipt must be given up on payment of the balance agreed to be accepted in satisfaction of the arrears of dividends to the 1st of January, 1851.”

“19th March, 1851.—Received the coupons for eight dividends to the 1st of January, 1851, on the Bond, Letter A., No. 13,555, for 100*l.* on which 2*l.* on account of such dividends have this day been paid in respect of every 100*l.* stock.”

(Signed by the Financial agent of the Mexican Government).

Monsieur Paolo Emiliani Guidici, assigned and transferred the same to the parties of the third part, upon certain trusts in the said indenture contained.

The said parties, by their solicitors, on the 9th January last, presented to the Commissioners of Inland Revenue the said deed of the 15th December, 1862, and desired to have the opinion of the said Commissioners as to the stamp duty with which the said deed was chargeable, and the said Commissioners, being of opinion that the said deed was chargeable, under the said act of parliament, with the duty of 98*l.*, being the ad valorem settlement duty in respect of the following stocks, funds, and bonds:—

£3800 0 0 Consols.

3446 10 4 Reduced Annuities.

|                                                     |   |   |   |         |   |   |
|-----------------------------------------------------|---|---|---|---------|---|---|
| 7246 10 4 at 92½                                    | . | . | . | £6,685  | 0 | 0 |
| 400 <i>l.</i> Indian 5 <i>l.</i> per cents., at 105 | . | . | . | 420     | 0 | 0 |
| 130 Globe Insurance shares, at 112½                 | . | . | . | 14,625  | 0 | 0 |
| Four Shares Imperial Insurance, at 346              | . | . | . | 1,384   | 0 | 0 |
| Brazilian Bonds for 5400 <i>l.</i>                  | . | . | . | 5,400   | 0 | 0 |
| New Brunswick Bonds                                 | . | . | . | 3,300   | 0 | 0 |
| Nova Scotia Bonds                                   | . | . | . | 1,500   | 0 | 0 |
| 5000 <i>l.</i> fully paid-up Scrip Peruvian         |   |   |   |         |   |   |
| Loan                                                | . | . | . | 5,000   | 0 | 0 |
| Chilian Bonds for                                   | . | . | . | 800     | 0 | 0 |
| Mexican Remanet Bonds                               | . | . | . | 50      | 0 | 0 |
| TOTAL                                               | . | . | . | £39,164 | 0 | 0 |

And with the duty of 35*s.* in respect of the settlement of the other property, and that the deed was not chargeable with ad valorem duty in respect of the said Canada Bonds or Dutch Certificates, assessed and charged the said deed with the duties of 98*l.* and 35*s.* respectively; and also with four progressive duties of 10*s.* each (the said deed containing therein four entire quantities of 1080 words over and above the first quantity of 1080 words). Thereupon the

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said parties paid to the Receiver General of Inland Revenue the said sums of 98*l.* and 35*s.*, and four progressive duties of 10*s.* each, and the said deed was thereupon stamped with stamps denoting the said duties so assessed and paid as aforesaid, and also with the particular stamp provided by the said Commissioners, under the said last mentioned Act, to denote and signify that the full amount of stamp duty with which such deed was by law chargeable had been paid. The parties being dissatisfied with the determination of the Commissioners, so far as regards the assessment of ad valorem duty on the said India Stock, Brazilian Bonds, New Brunswick Bonds, Nova Scotia Bonds, Peruvian Bonds, Chilian Bonds, and Mexican Remanets, required the Commissioners to state and sign this case.

The question for the opinion of the Court is, whether the said deed of the 15th December, 1862, is chargeable with ad valorem settlement duty in respect of the foreign stocks and bonds therein enumerated.

Sir *G. Honyman* argued for the appellant (*a*).—The question depends on the construction of the 13 & 14 Vict. c. 97, Sched. tit. "Settlement" (*b*), which imposes an ad valorem

(*a*) The argument commenced on the 16th of January, but was adjourned in order that the case might be amended by appending copies of the foreign and scrip bonds, and it was subsequently argued on the 23rd of January, before *Pollock*, C. B., *Martin*, B., and *Pigott*, B.

(*b*) SETTLEMENT.—Any deed or instrument, whether voluntary or gratuitous, or upon any good or valuable consideration other than a bonâ fide pecuniary con-

sideration, whereby any *definite and certain* principal sum or sums of money, (whether charged or chargeable on lands or other hereditaments or heritable subjects, or not, or to be laid out in the purchase of lands or other hereditaments or heritable subjects, or not,) or any *definite and certain* share or shares in any of the government or parliamentary stocks or funds, or in the stock and funds of the Governor and Company of the Bank of England,

duty on any deed or instrument whereby any “*definite and certain principal sum*” of money, or any definite and certain share in any government or parliamentary stocks, or the stock of any company or corporation, is settled for the benefit of any person. In the former case the duty is imposed on the actual amount, in the latter on the market value. These foreign stocks and bonds are not a “definite and certain principal sum” of money, or government or parliamentary stock or the stock of any corporation, within the meaning of that Act. The legislature could never have intended that upon a settlement of bonds of this description, the value of which may be far less than their nominal amount, the same duty should be paid as upon the settlement of a sum of money. Many things are included in a marriage settlement upon which no duty is imposed, as the profits of business, household furniture, jewels, &c. [*Martin, B.*—Suppose a person had a sum of 10,000*l.* owing to him, and he settled it upon his daughter, would that be a settlement of a “definite and certain principal sum of money”?] Possibly it might be, if there were a remedy by action, which is not the case here. [*Martin, B.*—It would seem that a mortgage debt is within the statute, because it speaks of money “charged or chargeable on lands.”] That may

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or of the Bank of Ireland, or of the East India Company, or of the South Sea Company, or of *any other* company or corporation, shall be settled or agreed to be settled upon or for the benefit of any person or persons, either in possession or reversion, either absolutely, or for life or other partial interest, or in any other manner whatsoever;

If such sum or sums of money, or the value of such share or shares in all or any of the

said stocks or funds, or of such one or more of the said articles as shall be so settled or agreed to be settled, or both such sum or sums of money and the value of one or more of such articles together, shall not exceed in the whole 100*l.* . 5*s.* 0*d.*  
 And if the same shall exceed 100*l.*, then for every 100*l.* and also for any fractional part of 100*l.* . 5*s.* 0*d.*

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mean a rent charge. [*Martin, B.*—Suppose a man took a promissory note for a debt of 10,000*l.* and settled it on his daughter?] There he would have a remedy in case of non-payment. [*Pollock, C. B.*—The statute says, any definite and certain principal sum, whether chargeable on lands *or not*. That is equivalent to saying any sum, whether due from a person who has land and can pay it, or from one who has no land and cannot pay it.] If the contention on the part of the Crown be correct, a larger duty would be payable on these bonds, which are of a merely nominal value, than is paid upon the government stock of this country. It is admitted by the Crown that duty is not chargeable on the Canada bonds and Dutch certificates, therefore it is evident that the legislature did not intend to impose a duty upon every species of property which formed the subject of a settlement. [*Pollock, C. B.*—Assuming that the Commissioners are right in assessing the duty on these bonds, is there any objection to the amount?] If assessable at all, it is because they are “definite and certain principal sums of money,” in which case the duty would be chargeable, not on their market value, but on their nominal amount. [*Pollock, C. B.*—It is certainly an anomaly that duty should be chargeable on the nominal amount of these bonds, when it is only chargeable upon the market value of the government stocks of this country; and at the same time other bonds are included in the settlement upon which no duty is chargeable. *Pigott, B.*—What difference is there between one of these bonds and the bond of an individual? If these had been bonds given by subjects of the states of Chili, Mexico, or Peru, they would have been taxable.] In that case there would be a remedy, at least theoretically, since it might fail by reason of the insolvency of the individual; but a claim under these bonds could not be enforced against those States either practically or theoretically. A policy of

assurance is not a deed or instrument within the meaning of the 13 & 14 Vict. c. 97, Sched. tit. "Settlement:" *Saxville v. The Commissioners of Inland Revenue* (a). [Pollock, C. B.—The ground of that decision was that there was no settlement of any definite or certain sum of money, but only the transfer of a contract to pay a sum of money upon several contingencies which might or might not happen. Martin, B.—Where anything forms the subject of a settlement it is inserted as being of some value; and the legislature has said that ad valorem duty shall be paid upon it. How can we enter into an investigation as to whether the obligor of a bond is solvent or insolvent? In ordinary language a "principal sum" is the amount of debt upon which interest is payable, and if such a sum is due, we cannot take into consideration whether it is a good or a bad debt.] This is not like the settlement of an ordinary debt for which the creditor holds a mortgage or other security; it is the settlement of certain pieces of paper, saleable at their market value, the property in which passes by delivery. [Martin, B.—How do we know that the law of Chili did not provide, when the State of Chili entered into a binding obligation, that there should be some means of enforcing payment? The bonds say that the State of Chili is bound, on no pretence whatever, to refuse, evade, or delay the full and ample performance of its engagements.]—With respect to the Indian 5 per cents., that stock was created under the provisions of the 22 & 23 Vict. c. 39, and it is submitted that the 13 & 14 Vict. c. 97 only applies to stocks in existence at the time it passed.

*The Attorney General* (with whom was *The Solicitor General* and *Beavan*), for the respondents.—The case is within the language of the Act, and there is no hardship in

(a) 10 Exch. 159.

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imposing the duty. The parties knew that upon a settlement of these securities they would be liable to duty, and, if the rate of duty was higher than the value of the securities, they might have modified it, either by selling them and settling the proceeds of the sale, or by settling a sum equal to their market value, raised upon the securities. The words in the schedule of the Act, "whether charged or chargeable on lands, or not," shew that the legislature, by the expression a "definite and certain principal sum of money," does not mean cash in hand; and moreover a settlement implies an investment. Where by the terms of the security the principal is not payable at any particular time, but only at the option of the debtor, a difficulty might arise; but by the terms of these bonds the principal is absolutely payable at the time mentioned in them. Then what is there to distinguish them from ordinary bond debts? It is suggested that because they are the bonds of foreign states there is no means of enforcing their payment. They may, however, be of more value than bonds on which an action can be brought. But the Act does not regard the nature of the remedy any more than the solvency of an ordinary bond debtor. [*Martin, B.*—Suppose a debenture was void, and the parties for some reason or other thought fit to settle it, could not they require the Commissioners to inquire into its validity?] The only test is whether there is a settlement of a definite and certain principal sum, and it is not open to the Commissioners to inquire whether there would be a defence to an action on the bonds. It is immaterial that the remedy is attended with difficulty. There might be a settlement of money charged on land, without any personal liability to pay it; as, for instance, if a testator by his will charged property of a fluctuating value, such as mines, with a sum of money, subject to a life interest, there would be no right of action

against any person; but when the time for payment arrived there would be a remedy in equity against the land, which in the meantime might have become worthless as a security. But could any one doubt that would be a definite and certain principal sum of money charged on heritable subjects, which would be taxable according to its nominal amount? What difference could it make if the debt was due from an Italian or a Frenchman? The Commissioners cannot inquire into the forms of action in foreign countries, or what obstacles may be raised against the recovery of the debt. A bond debtor may be outlawed, or incapable of being served with process, but that does not render the debt the less a definite and certain principal sum of money. It must be assumed that there is some remedy upon these bonds. [*Pollock*, C. B.—Suppose a creditor settled his “claim” upon a bankrupt’s estate, as to which a final dividend of 5s. in the pound had been declared, but not paid. The Commissioners would inquire, “what is the amount of your claim?” Answer: “20,000*l.*, but I cannot receive more than 5000*l.*, as a final dividend has been declared.”] As regards the dividend, it would be a settlement of a definite and certain principal sum: as to the rest of the claim, it would be a mere contingency, depending on the chance of obtaining any future dividend from the bankrupt’s estate. An analogous case would be a settlement of the old French “Assignats,” or of foreign government securities long since repudiated by the state. In such cases the Court must look at the substance of the thing settled, and if it appears to be merely a litigious claim or a bare possibility, it is not within the Act. But it is different with a bond for a definite sum of money; and all the considerations applicable to such a case are equally applicable, whether it be an English or a foreign bond, the bond of an

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individual or of a state. [*Pollock, C. B.*—Suppose a settlement of a covenant to pay an annuity, would that be chargeable with ad valorem duty?] It would not come within the definition of a certain and principal sum of money, and for that reason annuities in any government or parliamentary stocks or funds are expressly charged according to their value.—With respect to the Indian stock, it was created under the authority of parliament, and is therefore within the words in the schedule of the 13 & 14 Vict. c. 97, “government or parliamentary stocks or funds.” Those words cannot be construed as limited to stocks or funds in existence at the time that Act passed.

*Sir G. Honyman* replied.

*Cur. adv. vult.*

*MARTIN, B.*, now said.—In this case the question is whether a marriage settlement is chargeable with ad valorem duty in respect of certain foreign stocks and bonds, under the 13 & 14 Vict. c. 97, Sched. tit. “Settlement,” or as a deed or instrument whereby a “*definite and certain* principal sum or sums of money” are settled. There seems to us little doubt about it.

First, as to the Brazilian bonds. These are the ordinary bonds of Brazil for payment of 100*l.* stock with 4*l.* 10*s.* per cent. interest; and in our opinion they fall within the expression “a definite and certain principal sum or sums of money,” being securities for a “definite and certain principal sum or sums of money.”

There are Nova Scotia bonds and New Brunswick bonds of the same character; there is also 5000*l.* paid-up Scrip Peruvian Loan, which at first would seem not to be of the same character, but on reference to the documents them-

selves, which are in the shape of bonds, it appears that there is no material difference. The Chilian bonds are of a similar description.

We had some doubt with reference to the Mexican Remanet bonds, but when looked at they appear to be documents given to the holders of Mexican bonds as a security for the arrears of dividends due on those bonds, and therefore we think they are of the same character, since they are in point of fact for the payment of a "definite and certain principal sum or sums of money," which was composed of interest which had fallen due on a previous occasion. Therefore our judgment on all of these securities is that they fall within the language of the act of parliament.

With respect to the only remaining security, the Indian 5l. per cents., that was stock created by an English act of parliament (22 & 23 Vict. c. 39) subsequently to the 13 & 14 Vict. c. 97. We cannot, however, but think that it is a "definite and certain share in a government or parliamentary stock," within the meaning of the latter part of the Schedule, for it is money raised in the United Kingdom, for the service of India, by the creation of stock bearing interest.

It therefore appears to us that the Commissioners were right, and their determination must be affirmed.

Determination of Commissioners affirmed (a).

(a) See 27 & 28 Vict. c. 18, ss. 11, 12, 13.

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The Court has no power, under the 43 Eliz. c. 6, s. 2, to deprive a plaintiff of his costs, on his accepting payment into Court of a sum under 40s., and giving up the rest of his claim. Nor where, upon a reference to the Master, the award is for a sum under 40s.

**T**HIS was an application for a rule calling on the defendant to shew cause why the plaintiff should not recover his costs in this action.

From the affidavit in support of the motion, it appeared that the action was brought to recover 208*l.* 10*s.* 6*d.*, for work done and goods supplied. The defendant paid into Court 1*l.* 6*s.*, which the plaintiff took out in satisfaction, giving up his claim for the residue. The plaintiff and defendant resided more than 20 miles apart.

*Holl*, in support of the motion.—The language of the 15 & 16 Vict. c. 54, s. 4, is imperative that, where an action is brought for a cause in which concurrent jurisdiction is given to the superior Courts by the 9 & 10 Vict. c. 95, s. 125 (which is the case here), the Court or a Judge at Chambers “*shall* thereupon by rule or order direct that the plaintiff shall recover his costs.” The section repeals and, so far as is here material, re-enacts the 13th section of the 13 & 14 Vict. c. 61, with the substitution of the word “*shall*” instead of “*may*.” But even upon the construction of the 13 & 14 Vict. c. 61, the view ultimately adopted in all the Courts was, that the Court or Judge had no discretion to grant or refuse costs. The 43 Eliz. c. 6, s. 2, only applies where the cause has been tried before a Judge.

*Oppenheim* shewed cause in the first instance.—The 43 Eliz. c. 6, s. 2, enacts:—“If upon any action personal to be brought in any Her Majesty’s Courts at Westminster, not being for any title or interest of lands, nor concerning

the freehold or inheritance of any lands, nor for any battery, it shall appear to the Judges for the same Court, and so signified or set down by the justices before whom the same shall be tried, that the debt or damages to be recovered therein in the same Court shall not amount to the sum of 40s. or above, that in every such case the Judges and justices before whom any such action shall be pursued shall not award for costs to the party plaintiff, any greater or more costs than the sum of the debt or damages so recovered shall amount unto, but less at their discretion." Unless this statute applies, a plaintiff whose real demand is under 40s. can obtain his costs in the superior Courts by claiming a sum above 40s., and taking out the sum really due when it is paid into Court. The action is being "pursued" in this Court. A difficulty is no doubt created by the requirement in the earlier part of the section, that it should be signified by the justices before whom the action is "tried" that the sum to be recovered does not amount to 40s. But it is submitted that the word "tried" need not necessarily mean "tried by a jury." The case of *Regina v. The Inhabitants of Haslemere* (a) presents some analogy in support of that view. There, the defendants having pleaded guilty, the indictment was held to have been "tried" before the Judge of assize within the meaning of the 5 & 6 Wm. 4, c. 50, s. 95, on the ground that the indictment was found in his Court, and the defendants were called on to plead to it before him. [*Bramwell*, B.—I have always understood that under the 43 Eliz. c. 6, s. 2, there must be a certificate by the Judge who tried the cause.] There is no reported decision that the statute does not apply, where money is paid into Court. [*Gray*, amicus curiæ, referred to two un-

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(a) 3 B. &amp; S. 313.

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reported cases. *Drury v. Goodall* (a), argued Hilary Term, 1863, and *Webb v. Sanderson* (b), argued Trinity Term, 1863.]

(a) *DRURY v. GOODHALL.*

*Gray* had obtained a rule calling on the defendant to shew cause why the plaintiff should not recover his costs of this action.—The affidavit in support of the application stated that the action was brought by the plaintiff, as indorsee, against the defendant as maker of a promissory note for 50*l.*, to recover 5*l.* 15*s.* the balance due on the note. The defendant pleaded payment into Court of 1*l.* 1*s.*, which the plaintiff accepted in full satisfaction and discharge of his claim, and entered a nolle prosequi as to the residue. At the time of the commencement of the action, the plaintiff dwelt at Leicester, in the county of Leicester, and more than twenty miles from the defendant, who then dwelt at Newton, in the county of Derby.—A similar application had been made to *Martin, B.*, at Chambers, who dismissed the summons on the ground that the plaintiff had recovered a less sum than 40*s.*

*T. Jones* shewed cause in Hilary Term, 1863 (Jan. 30), and referred to the 13 & 14 Vict. c. 61, ss. 11. 13, 15 & 16 Vict. c. 54, s. 4, and 9 & 10 Vict. c. 95, s. 128.

*Gray* was not called upon to support the rule.

PER CURIAM (a).—The rule must be absolute.

Rule absolute.

(b) *WEBB v. SANDERSON.*

*Gray* had obtained a rule calling on the defendant to shew cause why the plaintiff should not recover his costs of this action.—The affidavit in support of the application stated that the action was brought to recover 6*l.* 4*s.* 6*d.* for work done and conveyance of goods, and was referred by order of a Judge to the certificate of one of the Masters of the Court, under the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125). The Master certified that the sum of 9*s.* and 6*d.* was due to the plaintiff; and he recovered judgment for that sum. At the time of the commencement of the action, the plaintiff dwelt at Laundon, in the county of Oxford, and more than twenty miles from the defendant, who then dwelt in Manchester Buildings, Westminster.

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(a) *Pollock, C. B., Martin, B., Channell, B., and Wilde, B.*

The Court (a) made the rule absolute without calling on *Holl* to support it.

Rule absolute.

(a) *Pollock*, C. B., *Martin*, B., *Bramwell*, B., and *Channell*, B.

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*C. Pollock* shewed cause in last Trinity Term (June 2), and argued that the sum of 9s. 6d. was "recovered" within the meaning of the 13 & 14 Vict. c. 61, s. 11; and that notwithstanding the 15 & 16 Vict. c. 54, s. 4, and the 9 & 10 Vict. c. 95, s. 128, the Court might in its discretion disallow costs where the action was brought for a sum so small that it ought never to have been brought in a superior Court.

*Gray*, in support of the rule.—The plaintiff dwelt more than twenty miles from the defendant, so that the case falls expressly within the provisions of the 15 & 16 Vict. c. 54, s. 4, and 9 & 10 Vict. c. 95, s. 128; and the Court has no discretion in the matter.

Per CURIAM (b).—The rule must be absolute.

Rule absolute.

(b) *Pollock*, C. B., *Bramwell*, B., *Channell*, B., and *Wilde*, B.

### In re the Estate and Effects of DOMINGO CAPDEVIELLE, Deceased.

IN this case Domingo Capdevielle, executor of the last will and testament of Domingo Capdevielle, deceased, had been

A testator,  
born at Montory in France,  
of French

parents, in the year 1807 went to Cadiz where he was clerk to a merchant. He afterwards went to Gibraltar. In the year 1830 he came to England and carried on business as commission agent at Manchester until his death in 1859. During all that time he resided in lodgings for which he paid a weekly rent, and further weekly sum for his board. In 1835 he visited Montory, and again in 1846, when he passed a solemn act before a notary for the preservation of his co-hereditary rights of succession to a property there. He also then purchased a house and land at Montory, and desired that some apartments in the house should be kept ready for his return. He frequently expressed an intention to return to his native country. He devised all his real and personal property to his nephew in England. He had no real property in England, but a large amount of personal property consisting of cash and railway shares.

*Held*:—First, that the testator was domiciled in France, and therefore his personal property was not liable to legacy duty: Per *Martin*, B., and *Channell*, B. *Bramwell*, B., dubitante.

Per *Pollock*, C. B.—That whether or not the testator retained his domicile of origin, he acquired a domicile in England for the purposes of commerce.

Secondly.—That although the personal property was not liable to legacy duty, it was liable to succession duty: Per *Martin*, B., and *Channell*, B. *Pollock*, C. B., and *Bramwell*, B., dubitantibus.

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served with a writ of summons, under the 16 & 17 Vict. c. 51, s. 48, and the 24 & 25 Vict. c. 92, commanding him, within fourteen days, to deliver to the Commissioners of Inland Revenue an account of all the legacies and property of the said Domingo Capdevielle, deceased, and pay the duty chargeable thereon; or within the same time appear in the Court of Exchequer and shew cause why he made default.

The executor entered an appearance, and filed affidavits which stated the following facts (*a*).—The testator, Domingo Capdevielle, was the son of French parents, and was born towards the end of the last century at Montory, in the canton of Tardets, Basses Pyrénées, in the kingdom of France, where his parents resided, and his father possessed a small estate. In the years 1807 and 1808 he was clerk to a French merchant named Lagrave, in Cadiz, in the kingdom of Spain. On the invasion of Spain by the French, the testator and other Frenchmen residing in Cadiz were seized and imprisoned on board a Spanish hulk lying in the bay of Cadiz, which was afterwards driven by a storm to the opposite shore of Port St. Mary's, where the French army was, and this circumstance enabled the testator to return to his native country. After the peace in 1815, a friend of the testator, named Echecopar, visited him at his native village, Montory, where he had established a school, persuaded him to go to Gibraltar (*b*), advanced him the money for his voyage, and saw him embark. Two years afterwards, Echecopar went to Gibraltar and found the testator in the employ of his former principal, Lagrave, who some years afterwards formed a partnership with

(*a*) No affidavit was filed by the testator was sent by his friends to Gibraltar to avoid the Crown.

(*b*) Another deponent stated conscription. that he had been informed that

another French merchant, and obtained for Capdevielle an interest in the new establishment. In 1830 he went to reside at Manchester to purchase manufactured goods for his firm, and shortly afterwards became the agent there of Messrs. Darthez, merchants of London, for the purchase of manufactured goods for the South American market. Finding this agency more profitable than his share of the Gibraltar firm, he retired from the partnership, and remained in Manchester as a shipping and commission agent, purchasing goods for Messrs. Darthez and other firms at Gibraltar.

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He died at Manchester on the 6th of January, 1859, and during the whole time he resided there he occupied lodgings hired by the week only, and consisting of two rooms, for which he paid 20s. a week, and for his board a further sum of 30s. a week.

The testator went to Montory in 1835, and again in 1846, when he remained there three months. On the 18th April, 1846, by arrangement between the testator and several members of his family, a solemn act was passed before a notary there, for the preservation of his cohereditary rights of succession over a property called Capdevielle, at Montory. In this act, to which his nephew and nieces were parties, the testator was described as "Dominique Capdevielle, merchant, of Manchester in England, native of Montory," and his nephew and nieces "declared that their uncle, Dominique Capdevielle, had been absent twenty nine years, and that he had not forfeited his cohereditary rights to the estate of the house of Capdevielle, and desired to maintain his right for the future without any opposition whatsoever." On the 20th of April, 1846, the testator, whilst at Montory, purchased the "Hauras" estate there, consisting of a house with 95 acres of land, for 125,000 francs. In the contract for the purchase of this estate, the testator was described as "Dominique Capdevielle,

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merchant, of Manchester in England." He also had in view the purchase of an adjoining estate, called Garaye. Whilst at Montory the testator expressed an intention to retire from Manchester, and to come and reside in the Hauras house which he had purchased. A niece of the testator deposed that he "left the house Hauras under her care until his arrival, and enjoined her to keep it in good order, and especially a bed which he desired to be kept in readiness for his repose during his latter days. From the year 1840 until the time of the testator's death the deponent received several letters from him (which had been destroyed), in which he "always reiterated his intention to retire and to come to Montory, and said therein that deponent was to expect him every day." A nephew deposed that the testator "entrusted to him the reparation of the house 'Hauras,' and enjoined him above all to have a room well and properly furnished for his reception on his return, in which he might pass the remainder of his days." The executor of the testator, who assisted him in his business from the year 1844 until his death, deposed that "the deceased often expressed to him his wish and desire to retire from England to France, and to end his days in the latter country. Subsequently to his visit to Montory in 1846, and the purchase of the Hauras estate, he said to deponent that he had worked long enough; that he was in a position to give up business, and to retire to France to enjoy the fruits of his labours, and that he intended to retire to Montory to live on his property there; and he often repeated the same expressions of intention." A member of the firm of Messrs. Darthez also deposed to conversations in which the testator expressed an intention to return to France.

The affidavits set out the following expressions of the testator, in letters said to be destroyed. In a letter to his brother:—"The time is not far distant when I shall come

to live again with you all, my dear relations, with whom I desire to partake of and enjoy the fruits of my long and arduous career." In a letter to his friend Hauras, enjoining him to acquaint him when any good lands might be exposed for sale round Montory, he wrote :—"I want to buy them in order to satisfy the taste which I have acquired for agriculture. I want to raise some fine cows and calves; in fact I want to establish an English model farm and to become one of the largest landed proprietors of Montory." The affidavits also set out (amongst others) the following extract from a letter of the testator, addressed to S. Darthez, at Pau, and dated the 13th January, 1847.—"Until now obstacles have presented themselves to prevent the executing my proposed retirement from Manchester. I hope in God that I shall be more fortunate next Spring, when I shall have the pleasure to retire to the Pyrenees in company of our respected friend, M. J. P. Darthez of Paris, who wishes to go there for some time."

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The testator subscribed to the following charities at Montory: "Ecoles des Frères Chrétiens et Secours de Charité," "Bureau de Bienfaisance." When he went abroad he obtained his passport as a French subject; and he always spoke with affection of France as his native country.

The testator, by his will, devised and bequeathed all his estate, both real and personal, whether in possession, reversion, remainder or expectancy, unto his nephew, Domingo Capdevielle (who resided with him at Manchester) absolutely. The testator had no real estate in England, but his personal estate, which consisted of railway shares and cash, was of the value of 9279*l*.

*Bovill* and *C. Pollock* shewed cause (a) upon the above

(a) In Trinity Term, May 28 *Martin*, B., *Bramwell*, B., and  
 and 31, before *Pollock*, C. B., *Channell*, B.



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affidavits.—The first question is whether the testator's personal property is liable to legacy duty. That depends upon his place of domicile, for personal property having no situs follows the domicile of the owner. At one time it was considered that the 55 Geo. 3, c. 184, sched. pt. 3, tit. Legacies, 11 (a), applied to all legacies, whether the testator was domiciled in this country or not, but the case of *Thomson v. The Advocate General* (b) decided that general words of the statute "every legacy given by any will or testamentary instrument of any person" must of necessity receive some limitation; and that the statute did not extend to the will of any person who at the time of his death was domiciled out of England, whether his property was in England or not. That decision proceeded upon this general principle, that there was no intention to legislate on behalf of persons not subjects of this realm, a principle adopted in the case of copyright and other cases. The testator at the time of his death was domiciled in France. France was his domicile of origin, and he never acquired a domicile elsewhere. Both the factum and animus are wanting, for the residence of the testator in this country was not permanent but temporary; and he never intended to abandon his domicile of origin. He originally came to this country as a traveller or agent, lived in lodgings at a weekly rent, twice visited his native country, purchased an estate and subscribed to charities there; declared his right

(a) Declares that duty shall be payable "For every legacy specific or pecuniary, or of any other description, of the amount or value of 20*l.* or upwards, given by any will or testamentary instrument of any person who shall have died after the 5th April, 1805, either out of his or her

personal or moveable estate, or out of or charged upon his or her real or heritable estate, or out of any money to arise by the sale, mortgage, or disposition of his or her real or heritable estate, or any part thereof," &c.

(b) 12 Cl. & F. 1.

to be considered one of the co-hereditary representatives of the family, and frequently expressed an intention to return and end his days in his native country.

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There are three distinct descriptions of domicile. First the domicile spoken of by writers on international law, which is a question of belligerent rights, as, for instance, the capture of a person upon the ship of an enemy. There the domicile is easily determined. A person who goes to a foreign country to trade is under the protection of that country, and is domiciled where his trade is carried on. The second is municipal domicile, which does not exist in this country, because the word "domicile" is unknown to the English law. That has no reference to this case, except so far as the fact of a man having a municipal domicil would be some evidence of what was his international and ordinary domicile. Here, the testator exercised no municipal rights in this country. Thirdly, there is the domicile now in question. One of the principles established with reference to such domicile is, that the domicile of origin must prevail until the party has not only acquired another, but has manifested and carried into execution an intention of abandoning his former domicile: *Munro v. Munro (a)*. The presumption of law is against an intention to abandon the domicile of origin. No doubt, length of residence in a foreign country, per se, according to time and circumstances, raises a presumption of intention to abandon the domicile of origin and to acquire a new domicile, but such presumption may be rebutted by facts shewing that there was no such intention. A change of domicile is not to be inferred from the fact of a lengthened residence in a foreign country. To constitute a change of domicile it must be *animo et facto*:

(a) 7 Cl. & F. 842.

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*Hodgson v. Beauchesne* (a). These principles were affirmed by the House of Lords in *Moorehouse v. Lord* (b). There Lord Cranworth said:—"In order to acquire a new domicile, according to an expression which I believe I used on a former occasion, and which I shall not shrink on that account from repeating, because I think it is a correct statement of the law, a man must intend *quatenus in illo exuere patriam*." Lord Chelmsford and Lord Kingsdown used expressions to the same effect. It is not enough for a person to take a house in the new country, even with the probability and the belief that he may remain there all the days of his life. Change of residence alone, however long and continued, does not effect a change of domicile, as regulating the testamentary act of the individual: *Bremer v. Freeman* (c), *Brown v. Smith* (d). Pothier lays down that a person can only establish a domicile *animo et facto*; but when the domicile is once established in a place, it may be retained *animo solo*: Introduction Générale aux Coutumes d'Orléans, chap. 1, s. 9 (e). Vattel says that domicile is a fixed residence in any place, with an intention of always

(a) 12 Moore, P. C. 285.

(b) 10 H. L. 272.

(c) 1 Deane Eccl. Rep. 192.

(d) 15 Beav. 444.

(e) The following passage was cited:—"Observez qu'il n'est pas néanmoins toujours nécessaire qu'une personne ait actuellement une demeure dans un lieu, pour que ce lieu soit celui de son domicile: car une personne ne peut, à la vérité, établir son domicile dans un lieu qu'*animo et facto*, en s'y établissant une demeure: mais le domicile une fois établi dans un lieu, peut s'y retenir *animo solo*. C'est ce qui arrive

lorsqu'une personne quitte le lieu de son domicile pour un long voyage, ou pour aller résider dans un lieu où l'appellent des affaires passagères, ou un emploi amovible; car, quoique cette personne ait emporté avec elle tous ses effets, et n'ait conservé aucune demeure dans le lieu de son domicile d'où elle est partie, néanmoins elle est toujours censée conserver *animo* son domicile dans ce lieu, et elle demeure sujette aux statuts personnels de ce lieu, tant qu'elle ne s'est pas établi ailleurs un véritable et perpétuel domicile."

staying there: Liv. 1, chap. xix, § 218 (a). There must be an intention to change the domicile. [*Martin, B.*—Story's definition is, "that that place is properly the domicile of a person, in which his habitation is fixed without any intention of removing therefrom." But he afterwards says, "if a person has actually removed to another place, with an intention of remaining there for an indefinite time, and as a place of fixed present domicil, it is to be deemed his place of domicil, notwithstanding he may entertain a floating intention to return at some future period:" Story's Conflict of Laws, chap. iii, §§ 43, 46.] On what day or in what year can it be said that the testator abandoned his French domicile? [*Pollock, C. B.*—There are many cases, both in law and out of it, in which it may be predicated that a change has taken place, though it may be difficult to specify the precise time.] Some persons go abroad for the benefit of their health, others for the increase of their fortunes or the advancement of their families; but the domicile of origin remains, unless there is a fixed intention of abandoning it and permanently adopting another domicile. [*Pollock, C. B.*—If you adopt another, do you not *perma-*

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(a) The following passages were cited:—"Le *domicile* est l'habitation fixée en quelque lieu, dans l'intention d'y demeurer toujours. Un homme n'établit donc point son domicile quelque part, à moins qu'il ne fasse suffisamment connaître, soit tacitement, soit par une déclaration expresse, son intention de s'y fixer. Au reste, cette déclaration n'empêche point que s'il vient à changer de sentiment dans la suite, il ne puisse transporter son domicile ailleurs. En ce sens, celui qui s'arrête, même long

temps, dans un lieu, pour ses affaires, n'y a qu'une simple habitation, sans *domicile*. C'est ainsi que l'envoyé d'un prince étranger n'a point son domicile à la cour où il réside."

"Le *domicile naturel*, ou *d'origine*, est celui que la naissance nous donne, là où notre père a le sien; et nous sommes censés le retenir, tant que nous ne l'abandonnons pas pour en choisir un autre. Le *domicile acquis* (*adscititium*) est celui que nous nous établissons par notre propre volonté."

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nently adopt it?] The expression "permanently adopt" is used by Lord *Chelmsford* in his judgment in *Moorehouse v. Lord*. The true rule is laid down by Lord *Wensleydale* in *Aikman v. Aikman* (a): "Every man's domicile of origin must be presumed to continue until he has acquired another sole domicile by actual residence, with the intention of abandoning his domicile of origin." Here there was no fixed habitation at Manchester or any intention of remaining there, except week by week as long as convenient, and there was a clear intention of returning to France. [*Pollock*, C. B.—May not a man have two domiciles? Probably in France they would say that the testator had a French domicile, and we may say that he had an English domicile. Suppose a person who was born in the East Indies acquired a large fortune there, and, uno flatu, bought land in Scotland and England, and resided one half of the year in Scotland and the other half in England. Where would his domicile be?] It would be difficult to determine. The domicile of origin is presumed to continue, and the onus of proving an intention to abandon it is on those who assert a change: *La Virginie* (b), *In re Steer* (c).

Secondly, if the property is not liable to legacy duty, it is not liable to succession duty. Assuming that the testator was domiciled in France at the time of his death, there was no jurisdiction over him merely because he had personal property in this country. It might as well be contended that if a Frenchman domiciled in France made a will there and appointed a trustee of his personal property in England, the trustee would be liable to pay succession duty though the property was not liable to legacy duty. It would be contrary to every principle of legislation to affect the personal property of a Frenchman domiciled abroad, and con-

(a) 3 Macq. 854. 877.

(b) 5 Rob. Adm. Rep. 98.

(c) 3 H. & N. 594.

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trary to the principles of the Succession Duty Act to render personal property not liable to legacy duty liable to succession duty. The British parliament has no power to legislate for aliens beyond British territory: per Lord *Campbell* in *Boosey v. Jeffries* (a). The Succession Duty Act, 1853 (16 & 17 Vict. c. 51), is in pari materiâ with the Legacy Duty Acts. [*Channell*, B.—The rate of duty is the same in both.] Its title shews that the Succession Duty Act comprehends both successions and legacies. It is evident from the first section that as regards real property its situation is the test of its chargeability with duty, for the term “real property” is confined to property in Great Britain and Ireland. With respect to personal property, there is no limit as to its situation, yet it is admitted that the Act does not apply to all personal property wherever situate. The language of the 2nd section (b) is quite as general as that of the 36 Geo. 3, c. 52, s. 7, and the 55 Geo. 3, c. 184, sched. part 3, tit. Legacies (c); and ought to receive the limitations introduced into those Acts by the House of Lords in *Thomson v. The Advocate General* (d). The words “every past or future disposition of property” cannot apply to all dispositions of property whether by an Englishman or a foreigner, and whether situate in England or abroad; and “every devolution

(a) 6 Exch. 593.

(b) Sect. 2:—“Every past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property or the income thereof upon the death of any person dying after the time appointed for the commencement of this Act, either immediately or after any interval, either certainly or contingently, and either originally, or by way of substitutive limitation, and every devolution

by law of any beneficial interest in property or the income thereof, upon the death of any person dying after the time appointed for the commencement of this Act, to any other person, in possession or expectancy, shall be deemed to have conferred or to confer on the person entitled by reason of any such disposition or devolution a succession,” &c.

(c) *Ante*, p. 990, note.

(d) 12 Cl. &amp; F. 1.

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by law" cannot apply to all devolutions, but only to devolutions by English law of property situate in England, and the words "on the death of any person," cannot apply to every person whether a subject of this kingdom or a foreigner, and whether domiciled within the realm or abroad. By the 9th section the duties are to be considered as stamp duties. The 10th section imposes certain rates of duty according to the relation of the successor to the predecessor. That can only relate to a succession by English law to property in England. By the 18th section, no duty shall be payable "by any person in respect of a succession, who, if the same were a legacy bequeathed to him by the predecessor, would be exempted from the payment of duty in respect thereof under the Legacy Duty Acts." That has been interpreted to mean where legacies are expressly exempted: *The Attorney General v. Fitzjohn* (a); but it is important as shewing that the Acts are in pari materiâ. The 18th section proceeds to say:—"And no person charged with the duties on legacies and shares of personal estate under the Legacy Duty Acts, in respect of any property subject to such duties, shall be charged also with the duty granted by this Act in respect of the same acquisition of the same property." The 19th section says that leasehold estates shall be no longer charged under the Legacy Duty Acts as personal estate. The 30th and 32nd sections also shew that the Legacy Duty Acts and the Succession Duty Act ought to receive the same construction. *In re Bruce* (b) is an express authority that property in this country belonging to a foreigner who dies abroad, appoints an English executor, and bequeaths to English legatees, is not liable to legacy duty. This point came before the Lords Justices in the case of *In re Wallop's Trusts* (c). There a married woman, domiciled abroad,

(a) 2 H. & N. 465.

(b) 2 C. & J. 436.

(c) 33 L. J., Chan. 351.

exercised by her will a general absolute power of appointment, given to her by the will of her father, over property situate in England, and Lord Justice *Turner* held that legacy duty was not, but that succession duty was payable by the appointees. Lord Justice *Knight Bruce* expressed an opinion that the legacies were subject either to legacy duty *or* succession duty and that it was of no practical importance which. Lord Justice *Turner* also held that the Succession Duty Act applied to persons wherever domiciled, and that the rule “*mobilia sequuntur personam*” cannot, as under the Legacy Duty Acts, be made the ground of an exemption from duty. [*Pollock*, C. B.—Is not the rule of law, that when a power is exercised it is supposed to be the act of the person who created the power? If so, the decision in *Wallop's Case* was correct. *Martin*, B.—The ground of Lord Justice *Turner's* decision was that the Succession Duty Act ought not to receive the same limited construction as the Legacy Duty Acts.] In the case of succession duty there is a territorial jurisdiction over the real property by reason of its situation, but that is not so with respect to personal property. Therefore the judgment of Lord Justice *Turner* in *Wallop's Case* cannot be supported. That case was founded on the decision of the Lords Justices in the case of *In re Lovelace (a)*; but that case does not govern this, because the ground of that decision was that the succession was derived from the donor of the power, and he was domiciled in England. [*Pollock*, C. B.—*In re Wallop* has only a secondary authority, as the expression of the opinion of an eminent Judge and not the authority of a decided case, because Lord Justice *Knight Bruce* did not acquiesce in the grounds upon which Lord Justice *Turner* based his decision, but decided on a different ground, and many of the expressions of Lord Justice

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(a) 4 De Gex & J. 340.



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*Turner* were not necessary for the decision of the case.]—  
 They also referred to *Isherwood v. Oldknow* (a).

*The Attorney General* and *Beavan*, in support of the summons (May 31).—First, the evidence *prima facie* establishes, *animo et facto*, an English domicile. There are no circumstances which indicate that the testator ever intended to retain his domicile of origin. The facts that he purchased property in France, and his desire to retain his hereditary rights, are insufficient for that purpose. He resided for thirty years at Manchester, where he carried on the business of a commission agent, by which he acquired a large property, and in the deed of conveyance drawn up in France he is described as a merchant at Manchester. No inference can be drawn from the fact that he lived in lodgings; it may have been for convenience. In *Phillimore on Domicil*, ccvii., p. 122, it is said that in America “little, if any, stress is laid upon the fact of a person’s being only a boarder or lodger at a place. On a question of domicile, (it was said by President *Rush*), the mode of living is not material, whether on rent at lodgings, or in the house of a friend. The apparent or avowed intention of *constant* residence, not the manner of it, constitutes the domicile.” Again, in *Whicker v. Hume* (b), where the question was whether a Scotchman was domiciled in Scotland or England, Lord *Langdale*, M. R., said :—“ I consider it to be immaterial whether he resided in a house of his own or in lodgings. In fact he resided in London, with such occasional exceptions or absences as were consistent with London being his usual and common place of residence. We have the undoubted fact of residence, and if we can see from the evidence that this fact during its continuance was accompanied by an intention to make London his

(a) 3 M. & Sel. 382.

(b) 13 Beav. 366. 396.

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permanent place of residence, and the central place of his affairs and business, then it must, I think, be considered that London became his domicile, with the legal incidents of domicile." It is said that the testator always regarded France as his native country, but he would naturally do so, having been born in France. In *Whicker v. Hume* (a) Lord Langdale observed, that the testator never thought of repudiating or abandoning his character of Scotchman; and that there was no foundation in law for the notion that he could not acquire a domicile in England without repudiating his nationality as a Scotchman. [Martin, B.—There must be the concurrence of the animus and factum: *Aikman v. Aikman* (b), *The Attorney General v. Rowe* (c).] When once the factum is established, the animus is easily ascertained from acts and declarations. Here the testator may have had a floating intention to return to France, but the factum was wanting. In *Hodgson v. De Beauchesne* (d) the presumption arising from the fact of long residence in France was counteracted by evidence of intention. The fact of a long residence in England, for the purpose of carrying on business there, is inconsistent with the intention of converting it into a transitory residence. In order to prove intention, regard must be had to the fact of residence, its object, purpose, and the circumstances attending it. The dictum of Lord Cranworth, in *Whicker v. Hume* (e) and *Moorehouse v. Lord* (f), which, when unexplained, may seem doubtful, cannot have the meaning put upon it, for it would be inconsistent with the authorities relating to Englishmen domiciled in India; and moreover in *Whicker v. Hume* there was no indication of an intention "exure patriam," but

(a) 13 Beav. 366. 397.

(b) 3 Macq. 854. 877.

(c) 1 H. &amp; C. 31.

(d) 12 Moo. P. C. 285.

(e) 7 H. L. 124. 159.

(f) 10 H. L. 272. 283.

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the testator, a Scotchman, was held to have changed his domicile by a ten years' residence in London, although he continued to express an attachment to Scotland. Therefore the words "exure patriam" require some limitation; and they cannot mean "give up allegiance to the country of birth," but only "give it up as a place of residence." In Phillimore on Domicil, chap. ii., p. 11, there are definitions of domicile, according to the Roman and the French civil law, which would include this case. The learned author considers that the American Judges have been most successful in their attempts to define the word, and that it may be accurately designated as "a residence at a particular place, accompanied with positive or presumptive proof of an intention to remain there for an unlimited time." He proceeds to say "Domicil answers very much to the common meaning of our word 'home'; and when a person possessed two residences the phrase, 'he made the latter his home' would point out that to be his domicil." Mr. Justice Story in his Conflict of Laws, chap. iii., § 42, p. 51, 3rd ed., first gives the definition of the Roman law (a). The learned author then proceeds to state the definitions of the French jurists (b). Vattel has defined domicile to

(a) In eodem loco singulos habere domicilium, non ambigitur ubi quis larem rerumque ac fortunarum suarum summam constituit; unde (rursus) non sit discessurus, si nihil avocet; unde cum profectus est, peregrinari videtur: quod si rediit, peregrinari jam destitit: Cod. Lib. 10, tit. 39, l. 7.

Si quis negotia sua non in *colonia* sed in municipio semper agit; in illo vendit, emit contrahit, eo in foro, balineo, spectaculis

utitur; ibi *festos dies* celebrat; omnibus denique municipii commodis, nullis coloniarum fruitur; ibi magis habere *domicilium* quam ubi colendi causâ diversatur: Dig. Lib. 50, tit. 1, l. 27.

(b) Denizart says:—"Le domicile est le lieu, où une personne jouissant de ses droits, établit sa demeure et le siège de sa fortune:" Denizart, art. Domicil. The Encyclopedist says:—"C'est à proprement parler, l'endroit où l'on a placé le centre de ses af-

be "a fixed residence in any place, with an intention of always staying there." But Story observes that it would be more correct to say, that that place is properly the domicile of a person in which his habitation is fixed, without any present intention of removing therefrom. Story, § 44, says:—"Two things then, must concur to constitute domicile; first, residence; and secondly, the intention of making it the home of the party." There must be the fact and the intent; for, as Pothier has truly observed (*a*), a person cannot establish a domicile in a place, except it be *animo et facto* (*b*). [*Pollock*, C. B.—Suppose a Frenchman, who was making in this country 10,000*l.* a year, was asked whether he meant to abandon his French domicile, and he replied, "No, I do not, I love my native country, but I mean to stay in England so long as I make 10,000*l.* a year," if he died in this country I apprehend that notwithstanding his declaration he would have acquired an English domicile.] It is the fact of residence coupled with an intention of remaining which constitutes domicile; a change of residence for a mere temporary purpose is insufficient: Story, § 44. It is asked, "when did the testator's change of domicile take place?" There is ample ground for saying

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faïres:" *Encyclop. Moderne*, art. Domicil. Potier says:—"C'est le lieu, où une personne a établi le siège principal de sa demeure et de ses affaires:" Pothier, *Introd. Cout. d'Orléans*, ch. 1, § 1, art. 8.

(*a*) Pothier, *Cout. d'Orléans*, ch. 1, § 1, art. 9.

(*b*) Voet emphatically says:—"Illud certum est, neque solo animo atque destinatione patris familias, aut contestatione solâ, sine re et pacto, domicilium constitui; neque solâ domus compa-

ratione in aliqua regione; neque solâ habitatione sine proposito illic perpetuo morandi:" 1 Voet ad Pand. Lib. 5, tit. 1, n. 98. So D'Argentré says:—"Quamobrem, qui figendi ejus animum non habent, sed usus, necessitatis, aut negotiationis causa alicubi sint, protinus a negotio discessuri, domicilium nullo temporis spatio constituent; cum neque animo sine facto, neque factum sine ad id sufficiat:" D'Argentré ad Leg. Britonum, art. 9, n. 4, p. 26.

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that it took place when the testator left Gibraltar, and instead of returning to France came to England with an intention of remaining there. Mr. Justice *Story* deduces certain rules from the principles which have been established, the fourteenth of which is, "the mere intention to acquire a new domicile, without the fact of an actual removal, avails nothing, neither does the fact of removal without the intention." The eighteenth is:—"If a person has actually removed to another place, with an intention of remaining there for an indefinite time, and as a place of fixed present domicile, it is to be deemed his place of domicile notwithstanding he may entertain a floating intention to return at some future period." The same doctrine is laid down in *Burge Com. Colonial Law*, pp. 41, 42. [*Martin, B.*—Suppose a foreigner came to this country with the intention of remaining so long as his health and reasoning powers enabled him to carry on his profession, but with a firm determination to return to his native country when they failed, where would be his place of domicile?] In this country. [*Martin, B.*—According to what was said by Lord *Cranworth*, Lord *Chelmsford* and Lord *Kingsdown*, in *Moorehouse v. Lord*, it would not.] The context shews that the strong expressions there used were merely meant to convey the idea of a person incorporating himself as a permanent settlor in another country. If a man were bound to do every possible act to constitute himself a subject of the foreign state, no question of domicile could ever arise. In all the cases, the acts have been such as were consistent with an attachment to the native country, and also with an intention to reside permanently in the foreign country. In *The Attorney General v. Kent (a)*, it is clear that the testator, a Portuguese, never intended to divest himself of his

(a) 1 H. & C. 12.

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domicile of origin, for he described himself in his will as a Portuguese subject, and he was an attaché of the Portuguese Embassy, yet it was held that he had acquired an English domicile. In *Moorehouse v. Lord* (a), Lord *Chelmsford* said that the definition of the Vice Chancellor was "liable to exception in omitting one important element, namely, a fixed intention of abandoning one domicile and permanently adopting another. The present intention of making a place a person's permanent home can exist only where he has no other idea than to continue there, without looking forward to any event, certain or uncertain, which might induce him to change his residence." [*Bramwell*, B.—Suppose a person was satisfied, from having tried year after year an English and an Italian climate, that he could not live in health and peace in England, and therefore sold his house and furniture and removed to Naples, having no expectation whatever of returning. Then suppose some one said to him, "If your health should be restored, would you return to England?" and he answered, "certainly;" why would not that be a change of domicile? And yet it would agree with the Vice Chancellor's definition and with what Lord *Chelmsford* says (a):—"I pointed out in the course of the argument that this definition would reach the case of a person of delicate health going to a milder climate with a determination to remain there until his health was completely restored."] An intention of permanent residence may often be engrafted upon an inhabitancy originally taken for a special or fugitive purpose: *Story*, *Conflict of Law*, § 45, p. 55. The rule as to Anglo-Indian domicile was first laid down by the House of Lords in *Bruce v. Bruce* (b), where Lord *Thurlow* said:—"A person's being at a place is *prima facie* evidence that he is domiciled at that place, and it lies on those who say otherwise to rebut that evidence.

(a) 10 H. L. 285.

(b) 2 B. &amp; P. 229, note.

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. . . A British man settles as a merchant abroad ; he enjoys the privileges of the place, he may mean to return when he has made his fortune, but if he dies in the interval, will it be maintained that he had his domicile at home ?” In the case of *The Harmony* (a), Lord *Stowell* said :—“ Of the few principles that can be laid down generally, I may venture to hold that time is the grand ingredient in constituting domicile, I think that hardly enough is attributed to its effects: in most cases it is unavoidably conclusive.” In *Cockerell v. Cockerell* (b), an English officer in the navy, upon half pay, went to India and remained there as a merchant for ten years, when he died, having acquired a large fortune there. He always received his half pay, and from time to time applied for and received fresh leave of absence ; and it was held by Vice Chancellor *Kindersley* that he was domiciled in India. In the case of *In re Steer* (c), the testator, a British born subject, who had resided at Hamburg for many years, expressly declared that he did not intend to renounce his domicile of origin ; but this Court held that his declaration of intention could not prevail against his foreign domicile. In *Lyall v. Paton* (d), the testator, whose domicile of origin was Scotland, sailed in 1807 from England to the East Indies. The vessel was wrecked, and he was taken prisoner and confined at Verdun, in France, until 1814, when he was released. In 1815 he went to India, and set up in business there. In 1835, he made his will at Calcutta, describing himself as of that place, and appointing two persons residing at Calcutta his executors. In 1836, he sailed from India in a vessel bound for an English port and died in itinere ; and it was held that the testator at the time of his death was domiciled in India. Vice Chancellor *Kindersley* there said that “ the continuity

(a) 2 Rob. Adm. Rep. 324.

(c) 3 H. &amp; N. 594.

(b) 2 Jur. N. S. 727.

(d) 25 L. J., Chan. 746.

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of residence alone, with the carrying on of the business, in the absence of any other circumstances, would undoubtedly lead to the conclusion that he had acquired an Anglo-Indian domicile, having abandoned his Scotch domicile of origin." Here the evidence by declarations is not opposed to the evidence of change of domicile which the facts and history of the life of the testator supply.

Secondly, assuming that the testator was domiciled in France, his personal property in England is chargeable with duty under the Succession Duty Act, 1853 (16 & 17 Vict. c. 51). There can be no presumption that it was never intended, for the personal property in this country of foreigners, wherever domiciled, is subject to probate duty and income tax; and by a late Act, 25 & 26 Vict. c. 22, Schedule (C.), a duty is imposed on any bond, debenture, or other security for money, wherever made, which shall be issued within the United Kingdom. It is reasonable that the personal property of foreigners, which is under the protection of British law, should contribute to the taxation of the country. The case of *Thomson v. The Advocate General* (a) does not govern this case. That was a question as to the meaning of the words *every* legacy given by the will of *any* person, in the 55 Geo. 3, c. 184, Sched., pt. iii., tit. Legacies, and it was held that they were limited to persons whose wills and legacies would be subject to the law of England. The same principle had been enunciated by Lord Cottenham, C., in *Arnold v. Arnold* (b). The language of the 2nd section of the Succession Duty Act is different, and a construction is to be put, not on the words "every legacy and will of any person," but on the words "every *disposition of property*" whereby any person becomes beneficially entitled to any property on the death of any person. Then the 10th section imposes a duty on

(a) 12 Cl. &amp; F. 1.

(b) 2 Myl. &amp; Cr. 256.



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"every such succession." How can the limitation of domicile be imported into those general words? No doubt they require some limitation, and as the words "legacy" and "will" were construed to mean a legacy given by the will of a person domiciled in England, the words "every disposition of property" must refer to property subject to the law of England. In *Wallop's Case* (a) Lord Justice *Turner* considered that the Succession Duty Act was intended to extend to cases in no way affected by the rule "*mobilia sequuntur personam*." "Disposition" includes not only testamentary instruments, but also deeds *inter vivos*. Suppose that by marriage settlement 50,000*l.* stock was settled on A. B. for life, with remainder to his six children on his death; if one of them went to France and became domiciled there, could it be contended that on the death of A. B., while the other five children are chargeable with succession duty on their shares, the one domiciled abroad is not liable to pay any? If a disposition *inter vivos* cannot be qualified by domicile, how can a disposition *post mortem*? [*Bramwell, B.*—If a Frenchman, domiciled in France, and possessed of property in the English funds, left it by will to another Frenchman, also domiciled in France, would succession duty be payable?] It would; in the case of a settlement on one person for life, with remainder to another, there could be no doubt. It can make no difference whether the settlor of the person beneficially entitled under the disposition is domiciled in France or England. The law of domicile has no reference to the transfer of stock, but merely regulates particular subjects, such as succession *ab intestato* or by will. The words "every disposition" cannot be read "every disposition *inter vivos*" or "every disposition by the will of a person domiciled in England." The word "property" includes both

(a) 33 L. J., Chan..351.

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real and personal property, and it is manifest that a disposition inter vivos of real property cannot be affected by domicile. [*Bramwell*, B.—Every act of parliament, unless there is something in the context to the contrary, must be taken to legislate for the subjects and territory of the realm. *Tindal*, C. J., in delivering the opinions of the Judges in *Thomson v. The Advocate General*, said that not only persons not subject to English law, but also property out of the territory, were exempt from legacy duty. He said:—"We cannot consider that any distinction can be properly made between debts due to the testator from persons resident in the country in which the testator is domiciled at the time of his death, and debts due to him from debtors resident in another and different country; but that all such debts do equally form part of the personal property of the testator or intestate, and must all follow the same rule, namely, the law of the domicile of the testator or intestate." That has given rise to these questions about domicile. Possibly it might be said that, as personal property follows the domicile of its owner, the legislature cannot be supposed to deal with the property of a testator or legatee out of the jurisdiction. Then why should not the same reasoning apply to this case? Some limitation must be put on the words "every disposition of property:" they cannot apply to a disposition by persons not subject to the law of the country.] The law of domicile has never been applied to determine the validity of contracts inter vivos concerning personal property. [*Martin*, B.—Assuming that the testator was domiciled in France, and that the universal rule is that personal property follows the domicile of its owner, in contemplation of law he, living at Montory, made his will there, and disposed of personal property, which though in the English funds must be considered as drawn by his domicile to Montory.] For the purpose of probate duty, the situs of personal property is

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the country where it is; and the Succession Duty Act makes no distinction between personal property affected by the law of domicile and that which is not. It is a fallacy to suppose that, because the Legacy Duty Acts and the Succession Duty Act are in *pari materiâ*, the same limitation must be put on the latter, when its object was to tax property which escaped taxation under the former Acts. The 18th section of the Succession Duty Act shews what was meant, namely, that where the Legacy Duty Acts have their operation no new tax shall be imposed, but that property not comprehended in the Legacy Duty Acts shall be included in the Succession Duty Act. The 42nd section makes the duty a first charge on the interests of the successor in real and personal property, so long as the same shall remain in his ownership or controul, or of any trustee for him; and by the interpretation clause "trustee" includes executor and administrator. Therefore all personal property in the hands of an executor, which escapes the legacy duty, is charged with succession duty unless expressly exempt by the Legacy Duty Acts; *The Attorney General v. Fitzjohn* (a). The principles enumerated by Lord Justice Turner in his judgments in *In re Lovelace's Settlement* (b), and *In re Wallop's Trust* (c), are decisive of this case.

*Cur. adv. vult.*

In the same Term (June 13) the following judgments were delivered.

MARTIN, B.—The judgment which I am about to deliver is that of my brother Channell and myself.

There are two questions in this case. First, was the testator Domingo Capdevielle domiciled in England?

(a) 2 H. & N. 465.

(b) 4 De Gex & J. 340.

(c) 33 L. J., Chan. 351.

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This is a question of fact to be determined upon affidavits which have been produced by the executor, and which I think we are bound to consider as substantially true; we have no reason to suppose they are otherwise. They state that the testator was born in France, and left that country prior to the year 1807 or 1808 to avoid the conscription. He first went to Spain; from thence to Gibraltar, and in 1830 came to England and commenced the business of a commission agent at Manchester, and continued it until the 6th January, 1859, when he died. He was twice in France during that period and purchased some real property there. I think it is the true and fair inference from the affidavits that during the whole time his mind and intention was to return to France and die there, although he never determined or fixed upon any period when his return should take place, and that he was living in Manchester with the intention of remaining there for an indefinite period; but during all the time he had the hope and expectation and intention of returning to France and there ending his life; and that he always deemed and considered himself to be a Frenchman and not an Englishman.

The question whether he was domiciled in England depends upon what is the true definition of domicile in regard to testamentary acts. In Story's Conflict of Laws, c. 3, § 46, it is said that "if a person has actually removed to another place with an intention of remaining there for an indefinite time, and as a place of fixed present domicile, it is to be deemed his place of domicile notwithstanding he may entertain a floating intention to return (to his native country) at some future period." If this be the true definition of domicile the testator was domiciled in England, for he had removed to Manchester and lived there for twenty-nine years, his intention was to remain there for an indefinite time as his fixed permanent domicile; and although I

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believe he had always what may be called a floating intention to return to France at a future period, yet this, according to the above definition, would not prevent the English domicile. There are also two other definitions of domicile, one in the same work, c. 3, s. 43, viz., "that place is properly the domicile of a person in which his habitation is fixed, without any present intention of removing therefrom;" the other is in Dr. Phillimore's Book on Domicile, c. 2, s. 15, p. 13, viz., "a residence at a particular place, accompanied with positive or presumptive proof of an intention to remain there for an unlimited time." If these be correct the domicile of the testator was English. But on the other hand there is a definition of domicile by Lord *Wensleydale*, in *Aikman v. Aikman* (a), which, if correct, seems to me to establish that the domicile of the testator was French. It is this:—"Every man's domicile of origin must be presumed to continue until he has acquired another sole domicile by actual residence with the intention of abandoning his domicile of origin. This change must be *animo et facto*, and the burthen of proof unquestionably lies upon the party who asserts the change." Now, if this be the correct definition of domicile the testator's domicile was French, for I think the undoubted inference from the affidavits is that he never had the intention of abandoning his French domicile; on the contrary he always desired to retain it; and it may be predicated with absolute certainty that the Attorney General did not establish the contrary. But it was said that Lord *Wensleydale* was not to be understood as intending what his words seem to express; but it is to me clear from the case of *Moorehouse v. Lord* (b), decided last year, that Lord *Wensleydale* was understood by the noble and learned lords who delivered judgment there in the sense which his words naturally mean. The three lords who delivered judgment,

(a) 3 Macq. 877.

(b) 10 H. L. 272.

Lord *Cranworth*, Lord *Chelmsford* and Lord *Kingsdown*, all go into the question of domicile. Lord *Cranworth* clearly intimates that the old view as to domicile was not correct, and that modern improved views existed. He says (a) in order to acquire a new domicile, &c., a man must intend “*quatenus in illo exuere patriam.*” It is not enough if you take a house in another place, and that it is tolerably certain that you had better remain there all the days of your life. That does not signify. You do not lose your domicile of origin merely because you go to some other place that suits you better, unless you mean to cease to be a Scotchman and become an Englishman, or a Frenchman, or a German. In that case if you give up everything you left behind you and establish yourself elsewhere, you may change your domicile. It is therefore clear to my mind that Lord *Cranworth* entertained the view as to domicile which the words of Lord *Wensleydale* naturally and in their ordinary meaning import. Lord *Chelmsford* is, if possible, still more clear. After stating that two definitions of domicile which had been mentioned were in his opinion liable to exception, he proceeds (b):—“The present intention of making a place a person’s permanent home can exist only where he has no other idea than to continue there, without looking forward to any event, certain or uncertain, which might induce him to change his residence. If he has in his contemplation some event upon the happening of which his residence will cease, it is not correct to call this even a present intention of making it a permanent home. It is rather a present intention of making it a temporary home though for a period indefinite and contingent. And even if such residence should continue for years, the same intention to terminate it being continually present to the mind, there is no moment of time at which it can be

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(a) 10 H. L. 283.

(b) Id. 285.

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predicated that there has been the deliberate choice of a permanent home. In a question of change of domicile the attention must not be too closely confined to the nature and character of the residence by which the new domicile is supposed to have been acquired. It may possibly be of such a description as to shew an intention to abandon the former domicile; but that intention must be clearly and unequivocally proved." He then clearly adopts Lord *Wensleydale's* definition as I understand it, and states it at length. Lord *Kingsdown* expressed his concurrence with the other judgments and added (a), "Upon the question of domicile I would only wish to say that I apprehend that change of residence alone, however long and continued, does not affect a change of domicile as regulating the testamentary acts of the individual. It may be, and it is, a necessary ingredient; it may be, and it is, strong evidence of an intention to change the domicile, but unless, in addition to residence, there is *intention to change the domicile*, in my opinion no change of domicile is made." I adopt the definition of Lord *Wensleydale*. I think it is approved of by the three noble and learned lords whose opinions I have quoted; and as I think there is no evidence of intention of the testator to change his domicile, in my judgment the domicile of the testator was French.

The other point is, whether, assuming the domicile to be French, succession duty is payable. The argument on behalf of the executor is very clear and apparently cogent. The duty is claimed in respect of a legacy of personalty, the testator is to be taken as having a French domicile. The rule of law is, that "*mobilia et personalia sequuntur personam*." It is said therefore to be the same as if the will had been made by a Frenchman who had never been out of France in his life, and all his personalty had been locally situated there. The House of Lords, in *Thomson v. The Ad-*

(a) 10 H. L. 291.

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*procurator General* (a), acted upon this principle, and have conclusively decided that legacy duty is not payable in respect of the present bequest; and there is certainly no expression to be found in the Succession Duty Act to shew an intention to alter the law. The House of Lords there put a limitation upon the words "every legacy given by any will of any person," and we are urged to put the same limitation upon the words "every disposition" in the 2nd section of the Succession Duty Act.

On the other hand the case of *Wallop's Trust*, decided by the Lords Justices on the 11th March in the present year, was cited by the Attorney General. It was the case of an appointment by will of personalty by the donee of a power domiciled in Jersey, the power being created by the will of a testator domiciled in England. The Lords Justices held succession duty to be payable. It was said that this case was not in point inasmuch as the legacy was under a power and took effect by virtue of the will of a testator who was domiciled in England. Lord Justice *Turner*, however, stated in the most express and direct terms that this was not the ground of his judgment, and that in his opinion the legatees of persons domiciled out of Great Britain, and the appointees of donees of powers so domiciled, were intended to be and were subject to succession duty by the second section of the Act.

This case is in substance in point, and I think we ought to be bound by it; and if it be wrong it ought to be set right by a Court of appeal, and not by one of co-ordinate jurisdiction.

BRAMWELL, B.—I agree that the Crown is entitled to duty. With respect to the first point, I cannot say that I dissent from the reasons given by my brothers *Martin*

(a) 12 Cl. & F. 1.



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and *Channell* for their judgment, because I am unable to form an opinion on the subject to which I can attach any value and therefore I am disposed to subscribe to that expressed by Judges whose opinions I so much respect. I wish, however, to state the reason of my difficulty.

Here a question arises on an English act of parliament, whether certain personal property is liable to legacy duty, and that depends on whether or no the testator was domiciled in England. I concur with my brother *Martin* in his appreciation of the facts with reference to the question involved. The word "domicile" is not to be found in the statute, but if by authoritative decision its operation is limited to cases where a testator was domiciled in England, no doubt our duty is simply to ascertain whether or no there has been an English domicile. To my mind that must always be a matter of great uncertainty, on account of the extreme difficulty in saying what constitutes an English domicile. Every definition, except one, of the word "domicile" would comprehend this case, and render the testator domiciled in England, and all the authorities relating to Anglo-Indian domicile point in the same direction. The only authority to the contrary is the decision of the House of Lords in *Moorehouse v. Lord* (a). No doubt the judgments pronounced by the noble and learned lords in that case, and the expressions of Lord *Wensleydale* in *Aikman v. Aikman* (b), tend to shew that the testator had not acquired an English domicile, because, according to my appreciation of the facts, he always had the intention, hope and expectation of returning to France, and perhaps of there ending his days. If I felt satisfied that this case was concluded by the decision of the House of Lords in *Moorehouse v. Lord*, of course I should trouble myself with no further reasoning about it, but follow, as I am bound to do, that decision. But in my

(a) 10 H. L. 272.

(b) 3 Macq. 877.

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opinion there are two difficulties in reference to it. One is that it is inconsistent with the former cases respecting Anglo-Indian domicile, and yet it does not expressly overrule them, or even notice them. The other is that the expressions used appear to me, with great deference, far too extensive. To say that a man cannot abandon his domicile of origin without doing all that in him lies to divest himself of his country, is a proposition which, with great submission, I think cannot be maintained. In the ordinary case of an Irish or English labourer emigrating to the United States of America, without any hope or intention of ever returning, but not naturalizing himself for fear of being subject to conscription; ready to claim the protection of the British Ambassador to prevent his being made a conscript, but having no desire or intention whatever to remain a British subject; I think that, if he died in America, it could scarcely be argued, that America was not his place of domicile, although he had not done all that in him lay to abandon his native country. Therefore, assuming those noble and learned lords intended to overrule previous cases, I have great difficulty in supposing that they intended everything which would be comprehended within the very extensive expressions they used.

That being so, I cannot help referring to the act of parliament; and, as I before observed, the word "domicile" is not found in it. The Act imposes a duty on *every legacy*, but the general words of the Act must be restricted to that which is properly the subject of a British legacy, that is to say, British personal property, and cannot apply to a foreigner, or an Englishman in the position of a foreigner, that is, domiciled abroad. I am content to suppose the rule of law reasonable, that personal property, having no situs, follows the domicile of its owner. But here is the case of a

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Frenchman who left his native country more than half a century ago, and who lived for nearly thirty years in England where he attained an old age, whose place of business was in England, who made his property in England, and invested the greater part of it there, who made a will in England which required probate in a Court in England, and who left property to a legatee residing there. Then why should not that property be subject to legacy duty, the legatee being in England and taking the property here under English authority? I own I cannot see why it should not; and acting on my own unassisted judgment I should have been unable to come to the conclusion that the property was not subject to legacy duty because the testator was a Frenchman and ought to be treated in the same way as a person who had never been in England and had no property here. I have considerable difficulty, either looking at the reason of the thing, or in the belief that the Anglo-Indian cases are overruled; whilst, on the other hand, I have a difficulty the other way, on account of the extensive expressions used by the noble and learned lords in *Moorehouse v. Lord*.

But then it is said that if the property is not liable to legacy duty it is liable to succession duty; and cases have been cited in support of that position. Although I have great faith in, and respect for, the authority of the learned Lord Justice who pronounced an opinion in accordance with that view (which was certainly not heartily concurred in by his learned coadjutor), I confess I have great difficulty in following that authority, for this reason, that whatever arguments can be used for the purpose of shewing that legacy duty is restricted to persons and property the subject of British legislation, so as to exonerate persons in a case like this, are equally applicable to succession duty, and the

Succession Duty Act equally requires some limitation in its application as the Legacy Duty Acts; because to my mind everything that is true of the one is equally true of the other. There is the same difficulty in applying the Succession Duty Act to *all* persons *everywhere*, whether domiciled in England or not, as there is in the case of the Legacy Duty Acts; and I cannot see why the same reasoning should not apply to the one as the other. I say most unfeignedly, though I have thought it right to give expression to the doubt I entertain, I feel myself so embarrassed in forming an opinion, that while I certainly agree in the conclusion at which my brothers *Martin* and *Channell* have arrived, I cannot say I differ even in the reasons they have given for it.

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POLLOCK, C. B., said. — I agree that the Crown is entitled to duty; but the grounds of my decision are not the same as those stated by the other members of the Court. I think that the argument of the Attorney General is well founded, and he established to my satisfaction that if the question now arose for the first time we should not be wrong in deciding that the testator, a Frenchman, who had resided in England a considerable number of years and amassed his property here, was domiciled in England; and therefore on his death his property was liable to be distributed according to the law of England and was subject to legacy duty. I am not satisfied, however, that such a decision would be in accordance with some recent authorities. Nevertheless, I entertain a very clear view of the grounds on which my opinion is founded, and in the result concur with the other members of the Court. I own that if I were to express all the doubts to which this question gives rise, I should require considerable time to state them at length.

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The question of domicile is a very large one, and it is not easy to ascertain affirmatively all that belongs to it, particularly when applied to English law. It is somewhat remarkable that "domicile" is now very frequently the subject of discussion in our Courts, and, as we have more than once observed, the word is comparatively entirely new to the English law, for neither it nor the notion it conveys belongs to anything English. The word "domicile" is not to be found in Viner's Abridgment, Bacon's Abridgment, Comyns's Digest, or in English law books from Bracton down to Blackstone. An English subject is domiciled in every part of England; but that is not so in foreign countries where the law of domicile prevails. There a man is domiciled at the particular part of the dominions where he was born, and there are certain acts which he cannot perform unless at his place of domicile. The English law knows no such disability. A British subject may marry or make a will in any part of the British dominions. I think that for certain purposes a person may have more than one place of domicile. I apprehend that a peer of England, who is also a peer of Scotland and has estates in both countries, who comes to parliament to discharge a public duty and returns to Scotland to enjoy the country, is domiciled both in England and Scotland. A lawyer of the greatest eminence, formerly a member of this Court, and now a member of the House of Lords, to whose opinion I, in common with all the profession, attach the highest importance, once admitted to me that for some purposes a man might have a domicile both in Scotland and England. I cannot understand why he should not. Then why may not the same thing occur with reference to commerce, manufactures, or any other purpose? Suppose, for instance, a person born in England of French parents (and therefore

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a French subject, with an English domicile of origin), had a large commercial establishment in both countries, without any particular attachment to either, but only intending to make the most money he could in both. Why should he not, for the purposes of the particular establishment, be domiciled in both countries, so that his property in England would be administered according to the law of England, and his property in France according to the law of France? But somehow or other a notion has crept in that although there may be three sorts of domicile, as in France, there can be only one for the purpose of administering property in England. I cannot conceive what reason or necessity there is for any such distinction, and in the case which I have put I cannot understand why a person, for the purpose of commerce and manufacture, should not have a domicile both in England and France.

Now, the conclusion to which the authorities lead is, that the testator was domiciled in England. Where British subjects have settled in the East Indies and there realised a large personal property, it has been considered exempt from legacy duty because they have acquired what is called an Anglo-Indian domicile. But there can be no doubt that in every one of those cases the party intended to return to this country and here spend the remainder of his days. I very much doubt whether the noble and learned lords who, in the case of *Moorehouse v. Lord*, expressed the opinions which have been adverted to, intended to say that the decisions with respect to Anglo-Indian domicile were wrong. The argument of the Attorney General has satisfied me that the testator acquired an English domicile; at the same time I think that my learned brothers are correct in saying that the opinions expressed by the noble and learned lords who decided the case of *Moorehouse v. Lord*

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are calculated to convey the notion that the definition of Mr. Justice *Story* (a) is not correct, and that a new definition of domicile may be given and acted upon in this country. However, a judgment of the House of Lords is only binding so far as it necessarily determines some certain proposition; it is not binding as to the reasons given by each of the noble lords, even though they should all concur in giving the same. If, indeed, the reasons for a judgment are so interwoven with the decision as to form a necessary part of it, no doubt it is an authority which no one ought to treat lightly, and to which every Judge ought to defer if he can; but he is not bound to do so, though he is undoubtedly bound by the judgment, or what may be called its essence and principle. In the case of *Moorehouse v. Lord* I should have come to precisely the same conclusion as the noble and learned lords who decided it, without thinking it necessary to give a new definition, or to enunciate any doctrine to be regarded as a new and improved view of the law of domicile, as if Mr. Justice *Story* was no authority, and all the antecedent writers on the subject wrong. I own I am not of that opinion. In my judgment the definition of Mr. Justice *Story* is for all practical purposes far more reasonable than any other that I am aware of. Seeing that the definition given in *Moorehouse v. Lord* was not necessary for the decision of that case, I am not disposed to adopt it in this. I am rather disposed to adopt the argument of the *Attorney General*, and agree with him that the testator was domiciled in England, and therefore his personal property is liable to legacy duty.

But it was further argued, on the part of the Crown, that assuming the testator was domiciled in France, and his property exempt from legacy duty, the case of *In re Wal-*

(a) *Story on the Conflict of Laws*, § 43, p. 53.

*lop's Trust* is an authority that it is liable to succession duty. I think that the opinions of the learned Judges of the Court of Appeal in Chancery are entitled to the greatest respect, but that Court is not, in matters of revenue, a Court of co-ordinate jurisdiction with this Court. I own that if in this case there had been a French domicile I should have entertained considerable doubt whether the property was liable to succession duty. But I so far respect the opinions of the learned Judges who decided *Wallop's Case* that I should be disposed to adopt their view. But whether we take one view or the other, according to the decision of the Lords Justices the Crown is entitled to duty; and if the *Attorney General* is right in saying that the domicile was English, which I think is really the correct view, there can be no doubt on the subject. I therefore agree with the rest of the Court that the Crown is entitled to duty; at the same time I have thought it right to make these remarks, because there are principles involved in our decision which I think by no means free from doubt.

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Cause shewn for non-delivery of the account  
 and non-payment of the duty and costs, dis-  
 allowed; and order for payment of the duty  
 and costs.



## MEMORANDUM.

In the Term (January 13) Mr. Serjt. *Ballantine* received a Patent of Precedence, to take rank next after *John Joseph Powell*, Q. C.





# AN INDEX TO THE PRINCIPAL MATTERS.

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## ABATEMENT.

*See* OUTLAWRY.

## ADMINISTRATOR.

*See* BANKRUPTCY, (4).  
EXECUTOR.

## AFFIDAVIT.

*See* BILL OF SALE, (3).

## AGREEMENT.

*See* WORK AND LABOUR.

## AMENDMENT.

*Of Writ—Declaration—Subsequent Proceedings by inserting Name of nominal plaintiff.*

Where a foreign bank sued in a corporate name by which it was known, and the defendant pleaded that it was not a body corporate, the Court allowed the writ, declaration, and subsequent proceedings to be amended by inserting the name of a director of the bank as nominal

plaintiff, it appearing that by the law of the country the bank was entitled to sue in his name. *La Banca Nazionale sede di Torino v. Hamburger,* 830

## APPEAL.

*See* QUEEN'S REMEMBRANCE'S ACT.

## ARBITRATION.

*See* COSTS, (1), (2), (3).

*Revocation of Arbitrator's Authority.*

By agreement in writing between the plaintiff and defendant, the plaintiff agreed to take the emptying of defendant's mill-pool upon the terms that the defendant should pay the plaintiff 5*d.* for every cubic yard of mud taken out of the pool; that the admeasurement of the mud removed be settled by N.; and that, if any dispute arose, it should be referred to N., to be by him decided. The plaintiff alleged that the defendant

prevented him from completing the work by flooding the pool, and the matter was referred to N., who awarded to the plaintiff a certain sum in respect of the quantity of mud then removed, and another sum in respect of damage occasioned to the plaintiff by defendant flooding the pool. In an action on the award, the defendant pleaded that before it was made he revoked the arbitrator's authority:—*Held*, on demurrer, that the plea was good, since the agreement to refer consisted of two distinct parts, viz., the admeasurement of the mud and the settlement of disputes, and that the latter part was revocable although the former was not. *Mills v. Bayley*, 36

## ATTORNEY.

(1). *Omission to pay Stamp Duty, or file Affidavit of Execution, or enrol Articles of Clerkship.*

The provisions of the 6 & 7 Vict. c. 73, ss. 8, 9, as to filing within six months an affidavit of the execution of articles of clerkship and enrolling them, are not merely for the purposes of the revenue, but also for securing the fitness of persons to be admitted as attorneys, and therefore, if the omission has been wilful, although the duty and penalty has been paid, the Court will not allow the service to be computed from the execution of the articles of clerkship.

Where a clerk served without having paid the stamp duty or enrolled his articles, partly in consequence of disappointment in receiving money which his father had promised him, and partly in consequence of an opinion of counsel, but after the expiration of the articles paid the duty and a penalty of 50*l.*, the

## AWARD.

Court refused to allow more than two years service under the articles. *Ex parte Belk*, 737

(2). *Delivery of Signed Bill.*

An attorney who is appointed clerk to Commissioners under a town improvement Act, at a fixed yearly salary, need not deliver a signed bill of costs for business done by him as such clerk. *Sarah Bush and Another v. Martin*, 311

## ASSAULT.

*Action by Woman for assaulting her and forcibly violating her Person.*

In an action by a woman for assaulting her and forcibly violating her person, whereby she was delivered of a child, the Judge upon her evidence directed a nonsuit.—*Held*, that the direction was right, for if a rape had been committed no action would lie until after the defendant had been prosecuted, and if the plaintiff had consented she could not maintain an action for the assault.—Per *Pollock*, C. B., and *Bramwell*, B.: *Dubitante Martin*, B. *Wellock v. Constantine*, 146

## ASSIGNEE.

*See* EXECUTOR.  
INSOLVENT.

## ATTACHMENT.

*See* FOREIGN ATTACHMENT.

## AWARD.

*See* ARBITRATION.  
COSTS, (1), (2), (3).

**BANKRUPTCY.**

*See* **INSOLVENT.**  
**TROVER, (1).**

**(1). Deed of Composition containing  
Covenant not to sue.**

A deed of composition, under the Bankruptcy Act, 1861, contained a covenant that if any creditor should sue the debtor, unless and until default should be made in meeting at maturity bills of exchange and promissory notes given as a security for the composition, the debtor's estate and effects should be thenceforth absolutely released and discharged from the debt.—*Held*, that the covenant was unreasonable and void, and could not be rejected; and consequently the deed was not binding on creditors who did not assent to it. *Dell v. King*, 84

**(2). Deed of Composition containing  
no Release of Debtor.**

A deed under the 192nd section of the Bankruptcy Act, 1861, does not operate as a statutable release of the debtor, pleadable in bar of an action by a creditor; and the debtor can only avail himself of it by application to the Court of Bankruptcy to stay the proceedings; or after certificate by application to the Court in which judgment has been obtained to stay execution.

*Semble*, that a deed by which a debtor assigns all his estate and effects to a trustee to be applied and administered for the benefit of his creditors in like manner as if he had been adjudged bankrupt, and which contains no release of the debtor, is a valid deed within the 192nd section of the Bankruptcy Act, 1861. *The Ipstones Park Iron Ore Company (Limited) v. George Pattinson*, 828

**(3). Act of Bankruptcy after Seizure  
of Goods under fi. fa., not perfected  
before filing Petition for Adjudi-  
cation.**

Where a debtor commits an act of bankruptcy after his goods are seized by a sheriff under a fi. fa., the execution is not valid, as against the assignees, unless it has been perfected by sale of the goods before the filing of the petition for adjudication of bankruptcy. *Young, Assignee of Meays, a Bankrupt, v. Roebuck*, 296

**(4). Proof of Administration Bond  
forfeited before Bankruptcy of Ad-  
ministrator.**

An administration bond, forfeited before the bankruptcy of the administrator, is not proveable under "The Bankrupt Law Consolidation Act, 1849," and consequently a certificate under that Act is no bar to an action on the bond. *Ann Marchman v. Henry Brookes and others*, 908

**BANKRUPT LAW CONSOLI-  
DATION ACT, 1849.**

(12 & 13 VICT. c. 106.)

*See* **BANKRUPTCY, (4).**

**BANKRUPTCY ACT, 1861.**

(24 & 25 VICT. c. 134.)

*See* **BANKRUPTCY, (1), (2), (3).**

**BASTARD.**

*Not a "Child" within 9 & 10 Vict.  
c. 93, s. 2.*

A bastard is not a "child" within sect. 2 of the 9 & 10 Vict. c. 93, and can therefore maintain no action under that statute. *Dickinson v. The North Eastern Railway Com-  
pany*, 735

## BILL OF EXCHANGE.

See COMMON LAW PROCEDURE ACT,  
1852, (2).  
DEBTOR AND CREDITOR.

## BILL OF SALE.

See TROVER, (1).

(1). *Assignment for Benefit of Creditors, exempt from Registration.*

By a deed, commencing in the form of a deed poll, the creditors "whose names and seals were thereunto subscribed and set" agreed to accept a composition from their debtor (part of which was guaranteed by a surety), and undertook to release their debts after payment of the composition of the days therein specified, and the debtor assigned to the surety all his stock in trade, &c., and other securities for the payment of the instalments guaranteed, in trust for the said creditors.—*Held*, that this was a deed of which any of the creditors might avail themselves, and, as such, was an assignment for the benefit of the creditors within the exemption in the 7th section of the Bills of Sale Act, and therefore exempt from registration under that statute. *The General Furnishing and Upholstery Company v. Venn*, 153

(2). *Goods in "Possession or apparent Possession" of a Vendor or Mortgagor.*

The "possession or apparent possession" of a vendor or mortgagor, under the Bills of Sale Act (17 & 18 Vict. c. 36,) is in general a question of fact.

Where personal chattels had been sold under written agreements not registered under the Act, and after the sale remained in the same place in which they had been kept by the vendor, but there were circumstances to shew that the vendee had done more than take mere formal possession of them, and upon an interpleader issue, after seizure under a fi. fa., the jury found bona fides in the transactions:—*Held*, that the property seized was not in the "apparent possession" of the vendor within the meaning of the interpretation clause, and that upon the facts proved there was sufficient evidence of actual possession by the vendee so as to prevent the operation of the statute.

*Quære*, whether the agreements (set out in the text) were bills of sale within the meaning of the Act. *Gough v. Everard*, 1

(3). *Execution within the twenty-one days allowed for filing Bill of Sale. Reference in affidavit to Description of Residence and Occupation of Attesting Witness in Bill of Sale.*

Where goods are taken in execution within twenty-one days allowed by the 1st section of the Bills of Sale Act for filing a bill of sale, it is not void as against the persons in the Act mentioned, although the holder of a bill of sale, intending to comply with the provisions of the Act, has filed documents not in conformity with it.

It is sufficient if the affidavit filed with the bill of sale refers to the description of the residence and occupation of the attesting witness mentioned in the bill of sale: Per *Pollock, C. B. Banbury v. White and Another*, 800

## CHILD.

### BOND.

*See* BANKRUPTCY, (4).  
LIBEL.  
STAMP, (2).

### BUILDING SOCIETY.

*See* DAMAGES, (1).

### BUTTY COLLIERS.

*See* TRUCK ACT.

### CANAL.

*See* GRANT.

### CARRIER.

*"Elastic Silk Webbing"—"Silks wrought up with other Materials," within the 11 Geo. 4 & 1 Wm. 4, c. 68.*

"Elastic silk webbing" is a woven fabric, each yard of which contains an ounce of silk, an ounce and a quarter of india-rubber, and three quarters of an ounce of cotton, the silk being of greater value than the two other materials. — *Held*, as a matter of fact (the question being reserved for the Court, with power to draw inferences), that this webbing was "silks wrought up with other materials" within the meaning of the Carriers Act, 11 Geo. 4 & 1 Wm. 4, c. 68, s. 1. *Brunt v. The Midland Railway Company*, 889

### CHARTER-PARTY.

*See* WARRANTY.

### CHILD.

*See* BASTARD.

## COMMON LAW, &c. 1027

### CLERK.

*See* ATTORNEY, (1).

### CODICIL.

*See* DEVISE, (1).

### COMMON LAW PROCEDURE ACT, 1852.

(15 & 16 VICT. c. 76.)

*See* WRIT OF SUMMONS.

(1). *"Reasonable Efforts to effect personal Service" of Writ of Summons.*

Where a British subject having a warehouse in London, resides out of the jurisdiction of the superior Courts, efforts to serve him with a writ of summons, at his warehouse, when he is in fact abroad, are not such "reasonable efforts to effect personal service," within the meaning of the 17th section of the Common Law Procedure Act, 1852, as to justify an order, under that section, that the plaintiff be at liberty to proceed as if personal service had been effected.

The exception of Scotland and Ireland in the 18th section of that Act does not, by implication, authorize proceedings against a person resident in those countries under the 2nd or 17th sections. *Flower and Others v. Allan*, 688

(2). *Action against Person residing out of the Jurisdiction, not being a British Subject.*

The defendant, a merchant residing in Norway, and not being a British subject, drew, indorsed and sent in a letter by post to a merchant in London a bill of exchange payable

in London, and which was indorsed to the plaintiff and dishonoured.—*Held*, that there was no cause of action which arose within the jurisdiction of the superior Courts, nor the breach of a contract made within their jurisdiction, and consequently the plaintiff could not proceed against the defendant under the 19th section of the Common Law Procedure Act, 1852. *Sichel v. Borch*, 954

### COMMON LAW PROCEDURE ACT, 1854.

(17 & 18 VICT. c. 125.)

*See* EQUITABLE DEFENCE.

### COMPOSITION.

*See* DEBTOR AND CREDITOR.

### CONSIDERATION.

*See* STAMP, (3).

### CONTRACT.

*See* COMMON LAW PROCEDURE ACT, 1852, (2).  
EVIDENCE, (3).

*Purchase of Goods to arrive "Ex Peerless from Bombay," there being two Ships of that Name about to sail from Bombay.*

To a declaration for not accepting Surat cotton which the defendant bought of the plaintiff "*to arrive ex Peerless from Bombay*," the defendant pleaded that he meant a ship called the "*Peerless*" which sailed from Bombay in October, and the plaintiff was not ready to deliver any cotton which arrived by that ship, but only cotton which arrived by another ship called the "*Peerless*," which sailed from Bombay in Decem-

ber.—*Held*, on demurrer, that the plea was a good answer. *Raffles v. Wichelhaus and Another*, 906

### CONTRACTOR.

*Liability for Injury occasioned by Negligence of Sub-contractor.*

The plaintiff received an injury by falling at night from the highway into an unfenced and unlighted sewer, which was being constructed under a written contract between the defendant and certain local Commissioners. A clause in the contract prohibited subletting without the engineer's consent. The defendant contracted by parol with N., a competent workman, to do the excavation, and brickwork, and the watching, lighting, and fencing, at an ascertained price per yard, while he supplied the bricks, and carted away the surplus earth. The defendant's name was on the carts, and also on a temporary office near the works. He did not interfere during the progress of the work, but admitted that he should have dismissed N. if dissatisfied with the execution of the work. The clerk of the works was in the employment of the Commissioners.—*Held*, upon motion for a nonsuit, that there was evidence for the jury of the defendant's liability. *Blake v. Thirst*, 20

### CONVERSION.

*See* TROVER, (2).

### CONVEYANCE.

*See* STAMP, (3).

### CORPORATION.

*See* AMENDMENT.  
INCOME TAX.

## COSTS.

- (1). *Where Verdict taken, subject to Reference, Costs of the Cause to abide the Event.*

Where a cause is referred and a verdict taken subject to a reference, costs of the cause to abide the event, the arbitrator to have power over the verdict, the plaintiff's right to costs depends on whether the sum awarded would have entitled him to costs if the jury had found a verdict for that sum.

To a declaration on the money counts the defendant pleaded, as to part, never indebted; as to other part, set-off; and to the residue, payment of 14*l.* 5*s.* into Court. At the trial a verdict was entered for the plaintiff, subject to a reference, power being reserved to the arbitrator to direct for whom and what amount the verdict should be finally entered, costs of the cause to abide the event of the award. The arbitrator by his award vacated the verdict for the plaintiff, and directed that the sum which he thereby found to be due to the defendant on the set-off should be deducted from the sum which he found to be due to the plaintiff on the general issue, and that the balance (2*l.* 16*s.* 1½*d.*) should be paid by the defendant to the plaintiff.—*Held*, discharging a rule obtained by the plaintiff to recover his costs of the action, that the 11th section of the County Court Act (13 & 14 Vict. c. 61) operated to deprive the plaintiff of his costs.

*Held* also, that the circumstance that the order of reference had by mistake been drawn up as a reference of all matters in difference was immaterial, it not appearing that any other matters than those which formed the subject of the action were

brought before the arbitrator. *Smith v. Edge*, 659

- (2). *Reference of Action of Slander, Costs of the Cause to abide Event, and Award of 20*s.* Damages.*

An action for slander was, after issue joined, referred by agreement to arbitration, the costs of the cause to abide the event of the award. The arbitrator found for the plaintiff, with 20*s.* damages. *Held*, that the plaintiff was entitled to costs. *Frean v. Sargent*, 293

- (3). *Where less than 40*s.* is paid into Court, and accepted; or where less than 40*s.* is awarded by an Arbitrator.*

The Court has no power under the 43 Eliz. c. 6, s. 2, to deprive a plaintiff of his costs on his accepting payment into Court of a sum under 40*s.* and giving up the rest of his claim.

Nor where, upon a reference to the Master, the award is for a sum under 40*s.* *Waylett v. Wyndham*, 982

- (4). *Where Joint Stock Company "dwells" within the meaning of the 9 & 10 Vict. c. 95, s. 128.—Judgment recovered by Official Liquidator of Joint Stock Company for sum under 20*l.**

A Company incorporated under the Joint Stock Companies Acts, for the manufacture and sale of goods, "dwells," within the meaning of the 9 & 10 Vict. c. 95, s. 128, at the place of manufacture and sale, and not at their registered office.

A Joint Stock Company sold and delivered goods to the defendant at their works at Keynsham, in Somersetshire, seven miles distant from the place where the defendant resided and carried on his business



## 1030 COUNTY COURT ACTS.

The registered office of the Company, where the directors met and transacted all their business was in London. The Company being in the course of winding-up, the official liquidator, who dwelt and carried on business in London, sued the defendant in a superior Court for the price of the goods, and recovered judgment by default for a sum under 20*l.*—*Held*, that the plaintiff was not entitled to costs. *The Keynsham Blue Lias Lime Company (Limited) v. Baker*, 729

(5). *Recovery of 10*l.* in Action on Lost Bank of England Note.*

The plaintiff brought an action in a superior Court to recover 10*l.*, the amount of a Bank of England note. The defendants pleaded with other pleas, that the note was lost. Whereupon the plaintiff obtained an order of a Judge, under the 87th section of the Common Law Procedure Act, 1854, that upon indemnity being given the plea that the note was lost should be struck out. The defendants, by leave of a Judge, then withdrew his other pleas and paid 10*l.* into Court, which the plaintiff accepted in satisfaction of his claim.—*Held*, that plaintiff was deprived of costs by the 120th section of "The London (City) Small Debts Extension Act, 1852" (15 Vict. c. lxxvii.), and that the case was not within the exception in the 122nd section, of a cause of action for which no plaint could have been entered in the Court. *Mary Noble v. The Governor and Company of the Bank of England*, 855

## COUNTY COURT ACTS.

(9 & 10 VICT. c. 95, s. 128.)

(13 & 14 VICT. c. 61.)

*See Costs*, (1), (4).

## DAMAGES.

### COVENANT.

*See BANKRUPTCY*, (1).  
*RENT*.

### DAMAGES.

*See WARRANTY*, (1).

(1). *Breach of Covenant to execute Assurances.*

R., the owner of building land upon which he had erected some houses, mortgaged it first to a Building Society for 4300*l.*, with a power of sale in default of payment; secondly, to the defendant for 350*l.*, and afterwards to several other persons for various sums. R. being unable to proceed with the building, by indenture, to which he, the Building Society, the defendant, and other mortgagees were parties, the premises were conveyed to the plaintiff in fee, discharged from all equity of redemption, but subject to the mortgage of the Building Society, in trust, in his discretion to sell the same, and out of the proceeds to pay, first expenses; secondly, the Building Society; thirdly, the defendant; fourthly, advances made by the plaintiff, and afterwards the other mortgagees in the order of their priority, with liberty for the plaintiff to raise a sum not exceeding 5000*l.*, for the purpose of carrying into effect the trusts of the indenture. The defendant covenanted that he would execute all assurances, reasonably required, for enabling the plaintiff to execute the trusts of the indenture. The plaintiff had made advances to the extent of 1150*l.* He had also arranged with the Building

Society to accept 4100*l.* in satisfaction of their claim ; and he had contracted for a loan of 5000*l.* on mortgage of the premises. The mortgage deed was prepared and all parties attended, when the defendant refused to execute it unless he was paid his debt of 350*l.*, and in consequence the Building Society sold the premises for 4510*l.*, which was not more than sufficient to pay their mortgage and expenses.

*Held*, that the plaintiff was only entitled to recover as damages the costs of the abortive mortgage : Per *Pollock*, C. B., and *Bramwell*, B.

Per *Martin*, B., that the plaintiff was entitled to recover, in addition to the costs of the abortive mortgage, the difference between 5000*l.* and the value of the land as building land ; or at all events 900*l.*, the residue of the 5000*l.* after paying 4100*l.* to the Building Society. *Duckworth v. Ewart*, 129

(2). *Breach of Covenant to Indemnify against Payment of Legacy, ceased to be a Charge on Testator's real Estate.*

A testator gave, on the death of his granddaughter, a legacy of 400*l.* to her child or children, to be paid at their respective ages of twenty-one years, and he charged the legacy on his residuary real and personal estate. The plaintiff, who was entitled under the will to a moiety of the real estate, effected a partition with the person entitled to the other moiety, and each of them covenanted with the other to pay a moiety of the legacy of 400*l.* The testator's granddaughter had only one child who died under the age of twenty-one years. In his lifetime the plaintiff sold his part of the real estate to the defendant, who covenanted with the plaintiff to pay him a moiety of the legacy of 400*l.*, and

also to save harmless and keep indemnified the plaintiff against all liability consequent on the non-payment of it. The personal representative of the legatees instituted a suit in Chancery to recover the legacy, when it was held that on the death of the legatee it ceased to be a charge on the testator's real estate. The plaintiff having brought an action against the defendant on his covenant to pay a moiety of the legacy :—*Held*, that the plaintiff was entitled to recover 200*l.*, and not merely nominal damages. *Hodgson v. Wood*, 649

## DEBENTURE.

*See* STAMP, (2).

## DEBTOR AND CREDITOR.

*See* BANKRUPTCY, (1), (2), (3).

*Deed given as Security for Debt, tainted with Illegality.*

The defendant being indebted to the plaintiff and other creditors, in order to induce the plaintiff to accept a composition agreed to pay him an additional composition, which was secured by a bill of exchange drawn by the plaintiff upon and accepted by the defendant's brother. The bill being dishonoured, and the plaintiff having threatened legal proceedings, the defendant, by indenture assigned to the plaintiff a policy of assurance as a security for payment of the bill.—*Held*, that the indenture was tainted with the illegality of the original transaction, and therefore could not be enforced. *Geore v. Charles Mare*, 339

## DEED.

*See* GRANT.

## DEED OF COMPOSITION.

See BANKRUPTCY, (1), (2).

## DEVISE.

(1). *Instrument operating as a Codicil and not as an original Will.*

In interpreting a will and codicil the general rule is, that the whole will takes effect except so far as it is inconsistent with the codicil.

If a devise in a will is clear, it is incumbent on the party who contends that it is not to take effect by reason of a revocation in the codicil, to shew an intention to revoke equally clear with the original intention to devise.

A testator by his will dated the 22nd October, 1802, charged an estate with certain annuities (including one to the plaintiff), and subject thereto devised the estate to his second son B. for life, with remainder to the children of B. in tail, remainder to G. the testator's eldest son for life, remainder to G.'s children in tail, remainder to the plaintiff for life, remainder to T. in fee. G. died in 1806 without issue. T. died in 1818. In 1819 the testator executed an instrument therein declared to be a codicil *to be added to and taken as part of his will dated on or about the 23rd October, 1802*, and thereby gave an *additional* annuity to the plaintiff, and, after giving certain other annuities and legacies, gave to B. *all his estates and property of every description whatsoever after discharging the above legacies*. The testator died in 1820. B. died without issue in 1861, and the defendants were his devisees.—*Held*, that the instrument of 1819 operated as a codicil to the will of 1802, and not as an original will, and that the life estate given to the plaintiff by the will was not revoked by the gift

to B. in the codicil. *Robertson v. Powell and Others*, 762

(2). *After acquired Property passing under Devise of all Real and Personal Estate; and Life Estate by Implication.*

In 1840, a testator devised as follows:—"I give and devise to my wife, all my part, share, estate or interest of and in the dwelling-house or tenement, and likewise the several closes or parcels of land hereinafter mentioned (describing them). And I also give and bequeath all my goods and chattels, dwelling-house or tenement heretofore mentioned unto my said wife for her use and interest during the term of her natural life; and after her decease I give and devise all my property, real and personal, unto my heir or heirs, to be equally divided among them and as joint heirs of this my above mentioned property." Several years afterwards the testator became possessed of two other closes and two cottages, and died in 1850.—*Held*, that the after acquired property passed under the will, and the testator's wife took a life interest in it. *John Jepson v. Key*, 873

## DOMICIL.

*Frenchman resident in England for Thirty Years as a Commission Agent.*

A testator, born at Montory, in France, of French parents, in the year 1807 went to Cadiz where he was clerk to a merchant. He afterwards went to Gibraltar. In the year 1830 he came to England and carried on business as commission agent at Manchester until his death in 1859. During all that time he resided in lodgings for which he paid a weekly rent, and a further weekly sum for his board. In 1835 he visited Montory, and again in

## EQUITABLE DEFENCE.

1846, when he passed a solemn act before a notary for the preservation of his co-hereditary rights of succession to a property there. He also then purchased a house and land at Montory, and desired that some apartments in the house should be kept ready for his return. He frequently expressed an intention to return to his native country. He devised all his real and personal property to his nephew in England. He had no real property in England, but a large amount of personal property consisting of cash and railway shares.

*Held*:—First, that the testator was domiciled in France, and therefore his personal property was not liable to legacy duty: Per *Martin*, B., and *Channell*, B. *Bramwell*, B., dubitante.

Per *Pollock*, C. B.—That whether or not the testator retained his domicile of origin, he acquired a domicile in England for the purposes of commerce.

Secondly:—That although the personal property was not liable to legacy duty, it was liable to succession duty: Per *Martin*, B., and *Channell*, B. *Pollock*, C. B., and *Bramwell*, B., dubitantibus. *In re the Estate and Effects of Domingo Capdevielle, deceased*, 985

## ELASTIC SILK WEBBING.

See CARRIER.

## EMBEZZLEMENT.

See NOTICE OF ACTION.

## EQUIPMENT.

See FOREIGN ENLISTMENT ACT.

## EQUITABLE DEFENCE.

*Trespass committed in carrying out*

## ESTOPPEL. 1038

*partly performed Contract for Sale of growing Timber.*

To a count in trespass for cutting down and carrying away timber growing on the plaintiff's land the defendant pleaded, for defence on equitable grounds, that the former owner, whose devisee the plaintiff was, had by agreement bargained and sold certain timber growing thereon to the defendant upon the terms that in a certain event the defendant might from time to time enter, cut down and carry it away at an agreed price; that, after the happening of the event and in the testator's lifetime, the defendant entered, cut down and carried away, and paid for part of the timber sold, and that his entering, cutting down and carrying away other part thereof, in pursuance of the said agreement, after the testator's death, and within a reasonable time, constituted the alleged trespass.—*Held*, that the plea was bad upon the ground that a Court of equity would not grant an unconditional injunction to restrain the action, and that a common law judgment for the defendant would not do final justice between the parties. *Wakley v. Froggatt*, 669

## ESTOPPEL.

See EVIDENCE, (3).

JOINT STOCK COMPANY, (1).

JUDGMENT, (1).

MORTGAGE.

VENDOR AND VENDEE, (2).

*In Trespass Quare Clausum Fregit against Defendant and Wife by Record of former Action against defendant alone.*

In trespass by A. against B. for breaking and entering A.'s land and building thereon a wall and cornice,

the issue on the plea of liberum tenementum was found in B.'s favour. In a subsequent action by B.'s devisees against A. and wife, the plaintiffs declared for an injury to their reversion by the wife in pulling down part of a *wall and cornice* built on land in occupation of the plaintiffs' tenant and described as in the former action. The defendants by their plea denied that the reversion was the plaintiffs'. At the trial the plaintiffs having put the record of the former action in evidence, the defendants admitted that the wife had no title but her husband's, but proposed to shew that in the former action the land overhung by the cornice was not in litigation:—*Held*—First, that to the plea pleaded the plaintiffs could not have replied by way of estoppel; Secondly, that the record was conclusive as to the title to the land overhung by the cornice at the period to which the plea of liberum tenementum referred, and that the evidence tendered was rejected rightly: dubitante *Martin, B. Whittaker and Others v. Jackson et Uxor*, 926

## EVIDENCE.

See ESTOPPEL.  
MONEY LENT.  
NEGLECT, (1).  
SEA SHORE.

(1). *Of Scier in Action for suffering diseased Sheep to go at large.*

The defendant's sheep, being diseased, got into the plaintiff's field where his sheep were grazing, and infected them with the disease. It did not appear how they got there. The defendant, on being told of it, used expressions indicating knowledge that his sheep were diseased. In an action against him for suffer-

ing his sheep to go at large:—*Held* that, in the absence of negligence, proof of a scier was necessary, and there was no sufficient evidence of it. *Cooke v. Waring*, 332

(2). *Of Belief and Reputation of Trustworthiness in Action for falsely representing a Tradesman trustworthy.*

In an action for falsely representing that W., a tradesman, was trustworthy, the defendant called as a witness his counterman, who was acquainted with the transactions between the defendant and W., and asked him: "Was W. at the time of the representation trustworthy to your belief?" The defendant also called four tradesmen of the same town, who were asked as to the general reputation of W. for trustworthiness.—*Held*, in the Exchequer Chamber (affirming the judgment of the majority of the Court of Exchequer), that the evidence was admissible. *Sheen v. Bumpstead*, 193

(3). *Admissibility of Parol Evidence to shew that Documents signed by the Parties purporting to be a Contract was never intended to operate as the real Contract between them.*

A document purporting to be a contract signed by the parties, is not necessarily so, and it is competent for either of the parties to shew by parol evidence that it was not their intention, in signing, that it should operate as a contract and that the real contract between them was not in writing.

The plaintiff, professedly as C.'s agent, sold bark to the defendants at a price to be subsequently ascertained by C. in a manner agreed on, and induced them to sign a bought

note which described the plaintiff as the seller at an ascertained price per ton, by representing that this price was nominal, and that as the defendants were dealing with the Crown, whose officer C. was, they would incur no risk. A day was fixed by the note on which a deposit of 20 per cent. was to be paid. The plaintiff had, in fact, himself purchased the bark from C. by verbal contract, but had not paid for it. Afterwards, and before the deposit was paid, the plaintiffs sent the defendants an invoice, specifying the quantity of the bark, and debiting them, as buyers from himself, with a sum calculated at the price per ton in the bought and sold notes (the real price not having been then ascertained by C.), and requesting them to pay the deposit to C., as originally arranged. The deposit was accordingly paid to C. by the defendants without objection to the basis on which it was computed. The plaintiff subsequently treated the sale as a sale by himself as principal at the price in the bought and sold notes. The defendants thereupon disclosed the whole transaction to C., paid C. the price which he had then ascertained in the manner originally agreed, and took possession of the bark.—*Held*: First, that parol evidence was admissible to shew that the bought and sold notes did not really contain the contract between the parties.

Secondly, per *Channell*, B., and *Wilde*, B., that if the bought and sold notes were to be taken as the contract, this contract was avoided by the plaintiff's fraudulent representations, and that there had been no subsequent election by the defendants to adopt it.

Per *Bramwell*, B., that the plaintiff was estopped from saying he was not C.'s agent, and consequently

that the settlement between C. and the defendants was an answer to the action. *Rogers v. Hadley and another*,  
227

## EXECUTOR.

See FIXTURES.

JUDGMENT, (2), (3).

*Husband of Administratrix of Lessee  
sued as Assignee.*

To a declaration against the defendant, as assignee of a lease of certain premises alleging the non-payment of rent, he pleaded: 1st, that administration de bonis non of the lessee of the demised premises was granted to A. whom he afterwards married, and that neither he nor his wife ever entered into nor took possession of the demised premises, nor did they vest in the defendant otherwise than as in and by the plea appears. 2nd: (after repeating the grant of administration and that the defendant married the administratrix) that the plaintiff sued the defendant and his wife as administratrix for the recovery of the same rent, and they pleaded plene administravit præter; that the plaintiff recovered judgment against them for the amount claimed, part thereof to be levied de bonis testatoris and the residue to be levied of assets quando acciderint. 3rd: (after repeating the matters alleged in the preceding plea) plene administraverunt præter goods not sufficient to satisfy the judgment debt.

*Held*, that all the pleas afforded a good answer as an argumentative traverse that the defendant was assignee: Per totam Curiam.

That the first plea was also good as shewing that the defendant, if liable at all, was only liable in a representative character, and that he



never entered or took possession of the demised premises: Per *Channell*, B.

That the second plea was also good as a plea in the nature of a judgment recovered: Per *Pollock*, C. B., *Channell*, B., and *Pigott*, B.; *Martin*, B., dubitante.

That the third plea would have been bad, if it had not amounted to an argumentative traverse that the defendant was assignee: Per *Martin*, B., and *Channell*, B. *Kearsley v. Oxley*, 896

### FIXTURES.

#### *Renunciation of ordinary Right of Tenant to disannex Tenant's Fixtures during Term.*

A tenant was let into possession of certain premises, which he was to fit up for musical performances upon the terms contained in a draft lease, which provided that he should at all times during the term keep sufficient and suitable fixtures and moveable furniture and effects on the premises for that purpose, and that none of such moveable furniture and effects should be removed therefrom, except for the purpose of repair or of being replaced by others; and also that in case the term should be determined by effluxion of time, but in no other, it should be lawful for the lessee, within twenty-one days after the expiration of the term, but not during any other period, to remove such fixtures, if any, as he might have affixed to the premises, unless the landlord should elect to purchase the same. It was also provided that if the lessee became bankrupt or insolvent, or if any distress or writ of extent or execution should be lawfully levied or executed by seizure on the said premises, it should

### FOREIGN ATTACHMENT.

be lawful for the lessor to re-enter and repossess the premises as in his former estate, and to seize and retain for his own use all fixtures whatsoever, tenant's or trade fixtures. The lessee annexed to the premises certain fixtures suitable for the purpose aforesaid, and which a jury found were tenant's fixtures. These fixtures were seized by a sheriff under a writ of fi. fa. issued upon a judgment recovered by a creditor against the lessee. Thereupon the lessor claimed the fixtures.—*Held*, in the Exchequer Chamber (reversing the judgment of the Court of Exchequer), that by the terms of the agreement the lessee had renounced the ordinary right of a tenant to disannex tenant's fixtures during the term, and consequently the sheriff had no power to take them in execution. *Anne Dumergue v. Rumsey and Another*, 777

### FOREIGN ATTACHMENT.

*See TROVER*, (2).

*Parties not Citizens or resident in the City of London, and neither original Debt nor that due from Garnishee accruing within the City.*

A writ of foreign attachment from the Lord Mayor's Court of the city of London was served within the city on the garnishee, who thereupon applied to a superior Court for a prohibition on the ground of want of jurisdiction, when it appeared by the pleadings that none of the parties were citizens or resident in the city, and neither the original debt nor that due from the garnishee accrued within the city.—*Held*, in the Exchequer Chamber; first, that the garnishee was entitled to a writ of prohibition and was not bound to

appear in the Lord Mayor's Court and there plead the want of jurisdiction, assuming he could plead such a plea.

Secondly, that the writ ought to prohibit the garnishment only, as the 20 & 21 Vict. c. clvii. restrained the defendant in the suit from objecting to the jurisdiction of the Lord Mayor's Court, except by plea in that Court.

*Quære*: whether a garnishee in the Lord Mayor's Court can plead any other plea than "nil habet." *Cox and Others v. The Lord Mayor, Aldermen, and Common Councillors of the City of London*, 401

## FOREIGN ENLISTMENT ACT.

(59 GEO. 3, c. 69.)

*Seizure of Vessel in British Port for alleged violation of Act, by equipping her for service of a belligerent State.*

The building, in pursuance of a contract, with intention to sell and deliver to a belligerent power, the hull of a vessel suitable for war, but unarmed, and not equipped, furnished, or fitted out with anything which enables her to cruise or commit hostilities, or do any warlike act whatever, is not a violation of the Foreign Enlistment Act, 59 Geo. 3, c. 69.

The equipment forbidden by the statute is an equipment of such a warlike character as enables the ship on leaving a port in this kingdom to cruise or commit hostilities; Per *Pollock*, C. B., and *Bramwell*, B.

If the character of the equipment is doubtful, it may be explained by evidence of the intent of the parties: Per *Channell*, B.

The Act includes a case where the

equipment is such that although the ship when it leaves a port in this kingdom is not in a condition at once to commit hostilities, is yet capable of being used for war, and the intent is clear that it is to be used for war: Per *Channell*, B.

Any act of equipping, furnishing, or fitting out, done to the hull or vessel, of whatever nature or character that act may be, if done with the prohibited intent, is within the language, and also within the spirit of the statute: Per *Pigott*, B.

On the trial of an information respecting the seizure of a vessel in a port at Liverpool for an alleged violation of the Foreign Enlistment Act, by equipping her for the service of a belligerent state,

*Held*: Per *Bramwell*, B., that a right direction would be, that if the jury were satisfied that the parties concerned were equipping, or arming, or attempting so to do, the ship claimed, with intent that it should be employed in the service of a foreign power to cruise or commit hostilities against others as alleged, they should find for the Crown; but such equipment or attempted equipment must be of a warlike character, so that by means of it she is in a condition more or less effective to cruise or commit hostilities; otherwise find for the claimants.

Per *Channell*, B.—The questions left to the jury should have been; 1st. Was there an intent on the part of anyone having a controlling power over the vessel that she should be employed in the service of the Confederate States to cruise or commit hostilities against the United States? 2nd. If so, was she equipped, fitted out, or furnished in a British port in order to be employed to cruise, &c.? 3rd. If not equipped, was there any attempt to equip



her in a British port in order that she should be so employed? 4th. Or did anyone knowingly assist, &c., in such equipment in a British port?

Per *Pigott*, B.—The jury should have been directed to see; first, whether the equippers, or the purchasers, had the prohibited intent: and secondly, whether with such intent they had done any act towards equipping, furnishing, or fitting out the ship, beyond the mere work of building the hull of the vessel, or had attempted or endeavoured so to do. *The Attorney General v. Sillem and Others*, 481

#### FORESHORE.

See SEA SHORE.

#### FRAUD.

See WORK AND LABOUR.

#### FRAUDULENT CONCEALMENT.

See INSURANCE.

#### FRAUDULENT REPRESENTATION.

See EVIDENCE, (2).

#### GARNISHMENT.

See FOREIGN ATTACHMENT.

#### GRANT.

See SEA SHORE.

*Of exclusive Right to use Pleasure Boats for Hire on Canal.*

An incorporated canal Company by deed granted to the plaintiff the sole and exclusive right or liberty of putting or using pleasure boats for

hire on their canal.—*Held*, that the grant did not create such an estate or interest in the plaintiff as to enable him to maintain an action in his own name against a person who disturbed his right by putting and using pleasure boats for hire on the canal. *Hill v. Tupper*, 121

#### GUARANTIE.

*Waiver of Stipulation for Benefit of Guarantee.*

By guarantie in writing, in consideration that the plaintiffs would stay execution upon a judgment against T. until a day named, the defendant undertook that the balance of debt and costs should be paid to the plaintiffs on or before that day, and if not paid by T., the defendant undertook to pay it, and, in consideration of the above undertaking, the plaintiffs agreed to stay execution until that day if the defendant gave Mersrs. W. satisfactory references as to his ability to pay the amount, but not otherwise; and if the references were not satisfactory, the guarantie to be given up within a week.—*Held*, that assuming the plaintiffs might waive the stipulation as to satisfactory references, it being a condition inserted for their benefit, they could not enforce the guarantie against the defendant until they had given him notice of the waiver. *Morten and Another v. Marshall*, 805

#### GUARDIANS OF UNION.

See POOR, (2).

#### HIGHWAY.

*Action against Surveyor for Damage occasioned by his Neglect to repair Highway.*

No action lies against a surveyor of highways appointed under the 5 & 6 Wm. 4, c. 50, for damage resulting from an accident caused by his neglect to repair the highway.—So held in the Exchequer Chamber (affirming the judgment of the Court of Exchequer). *Young v. Davis and Another*, 197

## INCOME TAX.

*Assessment of Railway Company in respect of Engine Drivers, Porters and Labourers.*

A railway Company is not liable to be assessed under Schedule (E.) of the Income Tax Acts in respect of engine drivers, porters and labourers, whether employed by them at annual salaries or at weekly wages amounting to 100*l.* a year; but such servants are assessable under Schedule (D.).

Schedule (E.) extends only to offices or employments under corporations which are of a public nature. *The Attorney General v. The Lancashire and Yorkshire Railway Company*, 792

## INFANT.

See TROVER, (1).

## INNKEEPER.

*Liability for Injury to Horse of Guest.*

By an arrangement between the defendant an innkeeper, and her ostler, he had the profit of the stables, paying no rent but providing hay, corn, &c., and supplying not only the guests in the inn but residents in the town, whose horses he was allowed to take care of. The plaintiff, who had no knowledge of this arrangement, arrived at the

defendant's inn with his horse and gig, which were taken to the stable, and the plaintiff became a guest. He subsequently left, saying that he should not be back till the following Monday, and requested that his horse should be attended to. He did not return for a fortnight, and in the meantime the ostler (for the purpose, as he said, of exercising the horse) drove it out, when it took fright at a locomotive steam-engine and was injured.—*Held* that the relation of innkeeper and guest subsisted between the defendant and the plaintiff, and consequently the former was liable for the injury done to the horse. *Day v. Bather*, 14

## INSOLVENT.

*Sale by Provisional Assignee of Insolvent's Reversionary Interests.*

The provisional assignee of an insolvent debtor may sell his reversionary interests without an order of the Court, under the 42nd section of the 1 & 2 Vict. c. 110. *Sturgis, Provisional Assignee of Brown, an Insolvent Debtor, v. Evans*, 960

## INSURANCE.

*Constructive Total Loss.—Notice of Abandonment.*

To a declaration on a valued time policy, averring a total loss, the defendant pleaded only a plea of fraudulent concealment.—*Held*, that a total loss was not admitted, for if that allegation had been traversed the plaintiff might have recovered as for a partial loss.

On the 23rd September, 1859, a ship having been compelled by sea-damage to put into a port near the Cape of Good Hope, the master had her surveyed, and on the 18th of October, 1859, wrote to the ship's

husband at Liverpool describing what had happened, and telling him to give the underwriters notice. On the 18th November he again wrote describing the damaged state of the ship, and stating that in the opinion of the surveyors she could not go home with a partial repair, but that she would not be worth the amount it would take to repair her. This letter was forwarded to the underwriters. On the 24th November the master executed a notarial act of abandonment, and on the 9th December sold the ship. On the 20th December he again wrote to the ship's husband stating that it would be for the interest of all concerned to abandon and sell, instead of repair, and that he had accordingly sold the ship, and he requested due notice to be given to the underwriters, who were then informed of the sale. The ship would not in fact have been worth the expense of repair. — *Held*, that there was no sufficient notice of abandonment to make a constructive total loss. *King, Bulwer and Others v. Walker*, 384

#### INTRUSION.

*See* SEA SHORE.

#### JOINT DEBTORS.

*See* JUDGMENT, (1).

#### JOINT STOCK COMPANY.

*See* COSTS, (4).

##### (1). *Blank Transfers of Shares feloniously filled up and sold to bonâ fide Purchasers.*

The plaintiff, the registered owner of 1000 shares in a Joint Stock Company, in which the shares could only be transferred by deed executed by both transferror and transferee,

employed a broker to sell for him some shares in another Company, which were also transferable by deed only. The broker represented to the plaintiff that it was necessary for him to execute ten blank forms of transfer. The plaintiff accordingly signed, sealed and delivered to the broker ten forms of transfer in blank to be filled up by him for the transfer of the shares in the other Company. The broker only used eight of the blank forms for that purpose, and having stolen the certificates from a box deposited at a bank for safe custody, he feloniously filled up the two remaining forms as transfers respectively of 500 of the plaintiff's 1000 shares in the first mentioned Company, and, having forged the attestations, he delivered the transfers, together with the certificates, to bonâ fide purchasers for value, and on their being presented to the Company, they removed the plaintiff's name from the register of shareholders and placed thereon the names of the purchasers.

*Held*, in the Exchequer Chamber, that the transfers were void, and that there was no such negligence on the part of the plaintiff as estopped him from insisting that the property in the shares did not pass under the transfers. — Per *Cockburn, C. J., Crompton, J., Willes, J., Byles, J., Blackburn, J., and Mellor, J.* — Dissentiente *Keating, J.*

Negligence, to operate as an estoppel, must be the proximate cause of the loss.

*Semble*, that the doctrine of estoppel by executing instruments in blank is confined to negotiable instruments, and does not apply to deeds. *Swan v. The North British Australasian Company (Limited)*, 175

##### (2). *Action for Calls when small Portion only of Amount stated in*

## JUDGMENT.

*Memorandum of Association is subscribed for.*

To an action for calls on shares in a joint stock Company incorporated under the 19 & 20 Vict. c. 97, it is no answer that the defendant became a shareholder upon the faith that the capital of the Company would be of the amount stated in the memorandum of association and that only a small, insignificant and insufficient portion thereof was subscribed. *The Ornamental Pyrographic Woodwork Company (Limited) v. Brown,* 63

## JUDGMENT.

See EXECUTOR.  
OUTLAWRY.

(1). *Plea by joint Debtors of Judgment recovered by another joint Debtor in Action for same Cause.*

A judgment recovered by one of several joint debtors cannot be pleaded as a defence to a subsequent action against the other joint debtors in respect of the same cause, unless the plea shews that the judgment was recovered on a ground which operated as a discharge of all. *Phillips v. Ward and Others,* 717

(2). *Application for Entry on Register of Judgment, that Judgment Debtor was taken in Execution under a Ca. Sa.*

A plaintiff having obtained judgment, registered it in order to operate as a charge on land, under the 1 & 2 Vict. c. 110, ss. 13, 19. The plaintiff afterwards took the defendant in execution under a ca. sa., and he was discharged from custody under the Insolvent Act. He afterwards acquired leasehold property which he mortgaged, and the mort-

## LANDS CLAUSES ACT. 1041

gagee contracted to sell it, but was unable to complete the sale in consequence of the registered judgment. — *Held*, that this Court had no power, on the application of the mortgagee, to order the plaintiff to attend before the senior Master of the Court of Common Pleas, and consent to an entry on the register that the defendant was taken in execution by the plaintiff on the judgment. *Hallett v. Dyne. Ex parte Rolls and Another,* 696

(3). *Right to Judgment whether enforceable by Execution or not.*

To an action for salary due from Commissioners, under a Town Improvement Act, to their clerk, they pleaded that they never had at or since the accruing of the debt funds applicable to the payment of it, and that they had applied all the monies which had come to their hands as such Commissioners, except a small sum set apart by them to satisfy certain other claims which had accrued since that of their clerk, and they never had nor were likely to have any surplus out of which they could pay his claim. — *Held*, on demurrer, that the plea was bad, and that, a debt being due, the plaintiff was entitled to judgment, whether it could be enforced by execution or not. *Bush v. Martin,* 811

## LANDLORD AND TENANT.

See EXECUTOR.  
FIXTURES.

## LANDS CLAUSES CONSOLIDATION ACT, 1845.

(8 & 9 Vict. c. 18.)

(1). *Compensation claimed by Tenant from Year to Year. Entry on Pre-  
LACH.*

*mises by Railway Company with Consent of Owners. Justification by Railway Company of pulling down House under Authority of their Act.*

To a count framed on the 68th section of the Lands Clauses Consolidation Act, 1845, alleging that the defendants, a railway Company, having taken the plaintiff's house for their works, made default in issuing their warrant to the sheriff to summon a jury for settling the compensation, whereby they became liable to pay the amount claimed, the defendants pleaded that the plaintiff had no greater interest in the house than as tenant from year to year; to which the plaintiff replied that he was never required to give up possession of the house, and that the defendants without his consent entered upon and took it, without any notice to him.—*Held*, on demurrer to the plea and replication, that the plea was good, since the plaintiff, having no greater interest in the house than as tenant from year to year, was not entitled to have the compensation claimed settled by a jury, but could only obtain it by the determination of justices under the 121st section.

To a count for entering the plaintiff's house and ejecting and expelling him therefrom, the defendants pleaded that the house was delineated on the plans and described in the books of reference deposited as in their Act mentioned, and that it was necessary to take and use the house for the purposes of that Act: that they entered and took possession of the house with the consent of the owners and occupiers thereof, and after such entry and possession taken the plaintiff took possession of the house and occupied the same, and the defendants, because it was ne-

cessary for the construction of their works authorized by that Act, entered the said house, the plaintiff not then being therein, and pulled down the same.—*Held*, on demurrer, that the plea was good, for the defendants having entered with the consent of the owners and occupiers of the house could not afterwards be treated as trespassers.

To a count alleging that the plaintiff was entitled to support for his house from an adjoining house, and that the defendants wrongfully deprived the plaintiff of the support of the adjoining house, by negligently and improperly pulling down the same, without taking any care to secure the plaintiff's house against the consequences of such pulling down, the defendants pleaded (except as to so much of the count as charged them with having negligently and improperly pulled down the adjoining house) that the same was delineated in the plans and described in the books of reference deposited as in their Act mentioned; and that because it was necessary in order to make the railway authorized by that Act they pulled down the said house.—*Held*, on demurrer that the plea was good. *Knapp v. The London, Chatham and Dover Railway Company*, 212

(2). *Compensation for Loss of Trade occasioned by Obstruction of Highway during Execution of Railway Works.*

Loss of trade occasioned by the obstruction of a highway during the execution of the works of a railway Company, is an injurious affecting of the tradesman's interest in his premises, which entitles him to compensation under the 68th section of the Lands Clauses Consolidation Act, 1845. *Senior v. The Metropolitan Railway Company*, 258

## LIBEL.

## LEASE.

*See* POWER.

## LEGACY.

*See* DAMAGES.  
DOMICILE.

## LESSOR AND LESSEE.

*See* EXECUTOR.  
FIXTURES.

## LIBEL.

*See* SLANDER.

*Proceedings against Sureties on their Recognizance under the 11 Geo. 4 & 1 Wm. 4, c. 9.*

Upon an application for leave to proceed against sureties upon their recognizances or bond to the Crown under the 11 Geo. 4 & 1 Wm. 4, c. 73, the Court of Exchequer acts judicially, not ministerially, and may refuse the application if, upon the facts before them, they are of opinion that the plaintiff is not entitled to proceed against the sureties.

Therefore where the plaintiff brought an action for libel against the editor of a newspaper, and a verdict was taken by consent for 2000*l.*, subject to the award of an arbitrator, who ordered the verdict to be reduced to 250*l.*, provided the defendant published an apology in his newspaper within a certain time, and the award was not taken up until long after that time by the plaintiff, who afterwards agreed to accept 1100*l.* in satisfaction of damages and costs, of which 650*l.* was paid by the defendant, who gave his acceptances for the remainder, the Court refused to order proceedings to be taken against the sureties upon their re-

Y Y Y 2

## LOTTERY.

1048

*cognizance. In the Matter of a Recognizance made to her Majesty, by John Chaplin and Adam Steele, as Sureties for Murdo Young. And in the Matter of Jones v. Young, 270*

## LIBERUM TENEMENTUM.

*See* ESTOPPEL.

## LICENCE.

*See* GRANT.

## LOCAL COMMISSIONERS.

*See* CONTRACTOR.

## LONDON (CITY) SMALL DEBTS EXTENSION ACT, 1852.

(15 VICT. c. lxxvii.)

*See* COSTS, (5).

## LOTTERY.

*"Contrivance or Device" within the 42 Geo. 3, c. 119, s. 2, by distributing Articles among Audience by calling out Numbers on their Seats.*

The programme of an entertainment stated, that at its conclusion the proprietor "would distribute amongst his audience a shower of gold and silver treasures on a scale utterly without parallel, besides a shower of smaller presents, all of which would be impartially divided amongst the audience, and given away." The public were admitted on purchasing tickets, which were not numbered. The seats of the audience were numbered. At the conclusion of the entertainment the proprietor called out a number on a seat, and delivered one of the articles to the person occupying that seat;



and in that way distributed all the articles amongst the audience.—*Held*, a lottery within the 42 Geo. 3, c. 119, s. 2. *Morris and Jeffs, Appellants, v. Blackman, Respondent*, 912

## LUNATIC.

*See* WRIT OF SUMMONS.

## MANOR.

*See* SEA SHORE.

## MARINER.

*See* SLANDER.

## MEDICAL ACT.

(21 & 22 VICT. c. 90.)

*Action by Physician for Fees.*

A physician registered under the Medical Act (21 & 22 Vict. c. 90), who attends a patient professionally, and is not prohibited from suing by any bye-law of the College of Physicians, can recover his fees without an express contract.

The presumption is not, as formerly, that he attends the patient for an honorarium, but for fees, the right to which can be enforced by action. *Gibbon v. Budd*, 92

MEMORANDA, 428, 791, 1021.

MERCHANT SHIPPING ACT,  
1854.

(17 & 18 VICT. c. 104.)

*See* SLANDER.

TROVER, (1).

## MONEY LENT.

*Evidence of Implied Promise.*

## MORTGAGE.

The defendant instructed his attorney S. to borrow 100*l.* upon the security of certain freehold estate, and gave him his title deeds to enable him to do so. S., professedly on behalf of the defendant, applied to the plaintiffs for a loan on mortgage, the amount of which was fixed at 420*l.* Thereupon, having forged a mortgage from the defendant to the plaintiffs, S. delivered it to the plaintiffs and received the 420*l.* He then represented to the defendant, that he could not obtain the proposed advance, and afterwards lent him certain sums as his own money, taking a promissory note as security for part, and a mortgage for the whole of the advances.—*Held*, that on these facts there was no evidence, as to any part of the 420*l.*, of an implied promise by the defendant to pay the plaintiffs, so as to support an action for money lent. *Painter and Others v. Abel*, 113

## MORTGAGE.

*See* BILL OF SALE, (2).

DAMAGES, (1).

JUDGMENT, (2).

MONEY LENT.

STAMP, (1).

*Estoppel. Persons claiming under Mortgages within the 7 Wm. 4 & 1 Vict. c. 28.*

The owner in fee of certain land, prior to mortgaging it for a term of years, put A. into possession. A. occupied for twenty-five years without payment of rent or written acknowledgment of the mortgagor's title. A. then conveyed in fee to the plaintiff, and after attorning to him as his tenant gave up possession for a sum of money to B., the representative of the mortgagor, and C. the executor of the mortgagee

## NEGLIGENCE.

(whose mortgage had been kept alive by payment of interest). B. and C. afterwards joined in a conveyance of the premises to the defendants.—*Held*, in an action of ejectment, first, that the defendants were not estopped from setting up their title to the premises; secondly, that they were persons claiming under a mortgage within the meaning of the 7 Wm. 4 & 1 Vict. c. 28, and consequently that the 3 & 4 Wm. 4, c. 27, did not operate to bar their title. *Ford v. Ager and another*, 279

## MUNICIPAL CORPORATION ACT.

(5 & 6 Wm. 4, c. 76.)

*Right of Burgesses created by Municipal Corporation Act to Share of Corporate Property.*

Burgesses created by the Municipal Corporation Act, 5 & 6 Wm. 4, c. 76, are not entitled to any share or benefit of the corporate property enjoyed by the freemen and burgesses of a borough before that Act passed. *Hulls v. Estcourt*, 47

## NEGLIGENCE.

*See* CONTRACTOR.

JOINT STOCK COMPANY, (1).  
RAILWAY COMPANY.

(1). *Occurrence of Accident primâ facie Evidence of Negligence.*

The plaintiff was walking in a public street past the defendant's shop when a barrel of flour fell upon him from a window above the shop, and seriously injured him.—*Held* sufficient primâ facie evidence of negligence for the jury, to cast on the defendant the onus of proving that the accident was not caused by

## NOTICE OF ACTION. 1045

his negligence. *Byrne v. Boadle*, 722

(2). *Injury to Children by falling of Cellar Flap placed against Wall.*

The defendants were the occupiers of a warehouse on one side of a street into which their cellar opened. The public had a right of way over the whole street subject to the existence of the cellar, but the only flagged footpath was on the other side. The defendants took off the lid which covered their cellar and left it nearly upright against their wall. A child jumped from the lid and pulled it over, injuring himself and another child. *Held*:—That the defendants were not liable at the suit of the first child, who had voluntarily meddled for no lawful purpose with that which, if left alone, would not have hurt him; but that they were liable at the suit of the second child, if not a joint actor with the first. *Hughes v. Macfie and Others. Abbott v. Macfie and Others*, 744

## NEWSPAPER.

*See* LIBEL.

## NOTICE.

*See* PUBLIC HEALTH ACT, 1848, (1), (2).

## NOTICE OF ACTION.

*Question to be submitted to Jury.*

Where a statute requires notice of action for anything done in pursuance of it; the proper question for the jury is, whether the defendant bonâ fide believed in the existence of a state of facts which, if they had existed, would have afforded a defence to the action.



Therefore where a statute (24 & 25 Vict. c. 96, s. 103,) provided that any person *found committing* any offence punishable, either upon indictment or upon summary conviction, by virtue of that Act, might be immediately apprehended without a warrant, and also required notice of action for anything done in pursuance of the Act; in an action by the plaintiff, a shopman of the defendant, for giving him into custody on the charge of stealing a florin:—*Held*, that it would not have been sufficient to leave to the jury the question whether the defendant honestly believed that the plaintiff had wrongfully taken the florin, and that in giving the plaintiff into custody he was executing a legal power, but the question ought also to be left to the jury whether the defendant believed that the plaintiff had been found committing the offence. *Roberts v. Orchard*, 769

## OUTLAWRY.

*When matter of Plea in Abatement no Ground for setting aside Judgment.*

The outlawry of a plaintiff, when matter of plea in abatement and not of plea in bar, is after verdict no ground for *setting aside* the judgment:—Nor, *semble*, when matter of plea in bar.

*Quære*, whether it be ground for *staying proceedings* on the judgment?

The plaintiff in an action of trespass *quare clausum fregit* was an outlaw on civil process. The defendant, on learning it just before trial, applied for leave to add a plea of outlawry, which was refused. The Court, after verdict, refused to set aside the judgment which had been signed by the plaintiff. *Sowerby v. Wadsworth*, 701

## POOR.

## PARISH.

*See* POOR, (1), (2).

## PAYMENT INTO COURT.

*See* COSTS, (3).

## PHYSICIAN.

*See* MEDICAL ACT.

## PLEADING.

*See* CONTRACT.

FOREIGN ATTACHMENT.

INSURANCE.

OUTLAWRY.

WORK AND LABOUR.

## PLENE ADMINISTRAVIT.

*See* EXECUTOR.

## POOR.

- (1). *Annexation of Extra-parochial Place to Union, under 20 Vict. c. 19, and Liability to contribute to Common Fund in manner provided by 24 & 25 Vict. c. 55, s. 9.*

After the 20 Vict. c. 19 passed, two justices appointed an overseer for S., which at the time that Act passed was an extra-parochial place having no poor and no poor rate. Afterwards the Poor Law Commissioners ordered that it should be added to a Union; and the guardians of the Union ordered that it should contribute to the common fund 50/. No expenses had ever been incurred by the Union on behalf of S., and it still had no poor and no poor rate.—*Held*: first, that the order of annexation was good; secondly, that S., being annexed to the Union, became

## POWER.

liable to contribute to its common fund, in manner provided by the 24 & 25 Vict. c. 55, s. 9. *The Overseers of the Parish of Staple Inn, Appellants, The Board of Guardians of Holborn Union, Respondents*, 284

### (2). *Limitation of Time for maintaining Action against Guardians of Union or Parish.*

No action can be maintained against the guardians of a union or parish for any debt, claim, or demand due from them unless such action is commenced within the half year in which the same shall have been incurred or become due, or within three months after the expiration of such half year, or unless the time has been extended by the Poor Law Board, under the 22 & 23 Vict. c. 49, s. 1. *Baker v. The Guardians of the Billericay Union*, 642

## POWER.

*See* WARRANTY.

*To grant Leases for twenty-one years, at a rack Rent, or building or repairing Leases for sixty-one years.*

A testator devised his freehold dwelling-house and premises to his three daughters and the survivor for life, "with full power to them or her to grant leases thereof, or of any part thereof, for a term or terms not exceeding twenty-one years, at a rack rent, and without taking any premium or premiums for the same; or building or repairing leases for the term of sixty-one years." The surviving daughter granted a lease for forty years, which contained a covenant by the lessee well and sufficiently to repair, maintain, amend and keep the demised premises in, by, and with all manner of needful and necessary

## PUBLIC HEALTH ACT. 1047

repairs and amendments whatsoever, and at the determination of the term to yield them up so being in all things well and sufficiently repaired, amended, and kept together, The lessee also covenanted that the lessor should be at liberty to enter and to view the state of the premises and that the lessee would, within three months after notice, sufficiently repair, amend, and make good all defects and want of reparation. There was a right of re-entry upon breach of the covenants.—*Held*, in the Exchequer Chamber (reversing the judgment of the Court of Exchequer), that this was a good "repairing lease" within the meaning of the power. *Easton and Another v. Pratt and Another*, 676

## PRACTICE.

*See* AMENDMENT.  
OUTLAWRY.

## PRINCIPAL AND AGENT.

*See* TROVER, (2) 1.

## PROHIBITION.

*See* FOREIGN ATTACHMENT.

## PUBLIC HEALTH ACT, 1848.

(11 & 12 Vict. c. 63.)

### (1). *Definition of "Owner of Premises let at a rack rent."*

The definition of an "owner" of premises let at rack rent, in sect. 2 of the Public Health Act, 1848 (11 & 12 Vict. c. 63), is satisfied by a person who is de facto receiving the rack rent.

Therefore where A., a person de facto receiving such a rent, was served by a Local Board of Health with a notice to sewer under sect. 69

of the same Act (by which service is to be upon the "owner" or "occupier"), and on his failure to comply with the notice the Local Board executed the sewerage works, and charged the expences under sect. 62 of the Local Government Act, 1858, (21 & 22 Vict. c. 98), to B., the appellant, who was owner, when the works were completed, B. (though his title to the premises had accrued prior to the service of the notice, and the notice had not been served on him, nor had he any knowledge of it till after the completion of the works,) was held liable for the expences incurred. *Peek, Appellant, The Waterloo and Seaforth Local Board of Health, Respondents*, 709

(2). *Service of Notice to Sewer on Clerk of Owner of Premises at his Place of Business.*

By the "Public Health Act, 1848," s. 69, if any street (not being a highway) be not sewered, levelled, paved, &c., to the satisfaction of the Local Board of Health, they may by notices in writing to the respective owner or occupiers of the premises fronting such parts as may require to be sewered, &c., require them to sewer, &c., the same within a time to be specified in such notice; and if such notice be not complied with, the Local Board may execute the works and the expences shall be paid by the owners in default. By section 150, in all cases in which any notice is required to be given to the owner or occupier of any premises it shall be sufficient to address the notice to them by the description of the "owner" or "occupier" of the premises, and the notice shall be served either personally or by delivering the same to some inmate of the owner's or occupier's place of abode.—*Held*, that service of a notice by delivering

it to the clerk of an owner at his place of business was a sufficient notice to satisfy the requirements of the 69th section, the 150th section being merely in aid of the service of notices: Per *Pollock*, C. B., and *Pigott*, B.

Per *Martin*, B., that the service was good under the 150th section. A place of business is a "place of abode," and a clerk an "inmate" within the meaning of the 150th section. *Mason v. Bibby*, 881

QUEEN'S REMEMBRANCER'S ACT.

(22 & 23 Vict. c. 21.)

*Power by Rule to extend to Revenue Side of Court of Exchequer the Provisions of the Common Law Procedure Act, 1854, as to Appeal.*

By the 26th section of the Queen's Remembrancer's Act, 22 & 23 Vict. c. 21, "it shall be lawful for the Lord Chief Baron and two or more Barons of the Court of Exchequer from time to time to make all such rules and orders as to the process, practice, and mode of pleading on the revenue side of the Court, and as to the allowance of costs, and for the effectual execution of this Act, and the intention and objects thereof, as may seem to them necessary and proper; and also from time to time, by any such rules or orders to extend, apply, or adapt any of the provisions of the 'Common Law Procedure Act, 1852,' and the 'Common Law Procedure Act, 1854,' and any of the rules of pleading and practice on the plea side of the said Court to the revenue side of the said Court, as may seem to them expedient for making the process, practice, and mode of pleading on the

revenue side of the said Court as nearly as may be uniform with the process, practice, and mode of pleading on the plea side of such Court." — *Held*, in the Exchequer Chamber, that the above enactment did not confer a power by rule or order to extend, apply, or adapt to the revenue side of the Court of Exchequer the provisions of the Common Law Procedure Act, 1854, as to appeal; Per *Cockburn*, C. J., *Crompton*, J., *Blackburn*, J., and *Mellor*, J. Dissentientibus *Erle*, C. J., *Williams*, J., and *Willes*, J. *Attorney General v. Sillem*, 581

## RAILWAY COMPANY.

See INCOME TAX.

LANDS CLAUSES CONSOLIDATION ACT, 1845, (1), (2).  
STAMP, (3).

(1). *Action by Guard for Injury occasioned by Negligence of "Ganger" of the Plate-layers.*

A railway Company is not liable for injury to the guard of a train, occasioned by the negligence of the "ganger" of the plate-layers in keeping the permanent way in proper repair and condition; the two servants being engaged in one common object, viz., the safe conduct of the passengers on their journey. *Waller, Administratrix of George Waller, deceased, v. The South Eastern Railway Company*, 102

(2). *Reasonable Conditions within the Railway Canal and Traffic Act.*

The owner of cattle, on sending them by a railway, signed a ticket stating that he thereby agreed to the following conditions of carriage:— "1st. The Company are to be free from all risk and responsibility with respect to any loss or damage arising

in the loading or unloading, from suffocation or from being trampled upon, bruised, or otherwise injured in the transit, from fire, or from any other cause whatsoever, it being hereby agreed that the same is to be carried at the owner's risk." "3rd. That, as the charge for conveyance is for the use of the waggon and locomotive power, the owner or his representative is required to see to the efficiency of such waggon before he allows his stock to be placed therein, and complaint must be made in writing to the station inspector or clerk in charge as to all alleged defects, either at the time of booking or before the waggon leaves the station." — *Held*, that these conditions were unreasonable, and void under the Railway, Canal and Traffic Act, 1854. *Gregory v. The West Midland Railway Company*, 944

## RAPE.

See ASSAULT.

## RATIFICATION.

See TROVER, (2) 1.

## RECOGNIZANCE.

See LIBEL.

## REGISTRATION.

See BILL OF SALE, (1).

## REGULÆ GENERALES, 429.

## RELEASE.

See BANKRUPTCY, (2).

## RENT.

*Sale by Auction of Ground Rent and Garden Rent.*

The defendant put up for sale by

public auction certain property described in the particulars as follows: —“Four freehold ground rents of 19*l.* 4*s.* each, viz., 15*l.* ground rent and 4*l.* 4*s.* garden rent, amounting to 76*l.* 16*s.* a year, arising from four capital residences of the annual value of 384*l.*, held by four leases granted to W. Reynolds for a term of ninety-five years each (wanting ten days) from the 29th of September, 1844, with reversion to the property in about eighty years.” The plaintiff became the purchaser and paid the defendant 282*l.* as a deposit in part payment of the purchase money. The vendors in making out their title produced four counterparts of leases from one Roy to Reynolds. By each of these leases, Roy, in consideration of the yearly rents thereafter reserved, demised to Reynolds a piece of land with a messuage thereon for the term of ninety-five years (wanting ten days) at the yearly rent of 15*l.*; and for the considerations aforesaid, and also in consideration of the further rent thereafter reserved and of the covenants of Reynolds, Roy covenanted with Reynolds that it should be lawful for him and the tenants of the messuage, at all times during the continuance of the said term, to enter upon and use and enjoy as a pleasure ground or garden a piece of land particularly described jointly with Roy, and Roy covenanted that he would at his own expense keep in order the garden. There was also a covenant by Reynolds to pay Roy the yearly rent of 15*l.*, and also the further yearly rent of 4*l.* 4*s.* in respect of the right of user of the garden or pleasure ground, such rent to be payable in the same manner as the rent of 15*l.*.—*Held*, in the Exchequer Chamber (affirming the judgment of the Court of Exchequer), that the rent of 4*l.* 4*s.* was a sum in gross payable under a

covenant, and not a rent issuing out of the land; and consequently the plaintiff was entitled to rescind the contract and recover back his deposit: per *Wightman, J., Crompton, J., and Blackburn, J.*—*Dissentientibus Williams, J., and Willes, J.* *Robins v. Evans and Others*, 410

### REPAIRING LEASE.

*See* POWER.

### REVERSION.

*See* ESTOPPEL.

### SALE.

*See* VENDOR AND VENDEE, (1), (2).

### SALMON FISHERY ACT.

(24 & 25 VICT. c. 109.)

- (1). *Catching Salmon otherwise than by Rod and Line, within Fifty Yards below a Dam without a Fish-pass attached to it.*

The 12th section of “The Salmon Fishery Act, 1861” (24 & 25 Vict. c. 109), absolutely prohibits the catching, or attempting to catch, except by rod and line, any salmon within fifty yards below any dam, unless it has attached to it a fish-pass, notwithstanding any ancient right by charter, grant, or immemorial usage of fishing in a salmon cage. *Moulton, Appellant, and Wilby, Respondent*, 25

- (2). *Right to take possession of and destroy fixed Engine for catching Salmon in inland or tidal Waters.*

Under the 11th section of “The Salmon Fishery Act, 1861,” the right to take possession of or destroy any engine placed or used for catching

## SETTLEMENT.

salmon in contravention of that section, extends to all persons, and is not limited to conservators or overseers appointed under the 33rd section. *Williams v. Blackwall*, 33

## SCIENTER.

See EVIDENCE, (1).

## SEA SHORE.

*Right of Lord of Manor to Sea Shore between high and low water mark.*

On the trial of an information of intrusion, the question being as to the title of the defendant, as against the Crown, to a portion of the sea shore between high and low water mark, adjacent to Cemmaes in the isle of Anglesea, the defendant gave in evidence a grant by James I of the manor of Cemmaes to the ancestor of the present lord of the manor, and also gave evidence of acts of ownership over the shore in question both by himself and the lord of the manor; and there was also evidence of acts of ownership on the part of the Crown. The learned Judge told the jury that the grant of the manor did not pass the sea shore, and he left it to the jury to say whether they were satisfied by the evidence of user that the defendant had acquired a title as against the Crown.—*Held*, a misdirection; and that the proper question was whether the evidence of user coupled with the grant satisfied the jury that the defendant had such title.

*Quære*, whether the Venedotian Code of Howel Dda is now the law of Anglesea. *The Attorney General v. Jones*, 347

## SETTLEMENT.

See STAMP, (2).

## STAMP.

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## SHARES.

See STAMP, (2).

## SHEEP.

See EVIDENCE, (1).

## SHIP.

See TROVER, (2).

## SILKS.

See CARRIER.

## SLANDER.

*Words imputing Drunkenness to a certificated Master Mariner.*

Words imputing to a certificated master mariner, drunkenness whilst in command of a vessel at sea, are actionable without special damage. *Irwin v. William Brandwood and Jane his Wife*, 960

## SOLICITOR.

See ATTORNEY.

## SPECIAL DAMAGE.

See SLANDER.

## STAMP.

(1). *Ad valorem Duty chargeable under the 16 & 17 Vict. c. 38, in respect of Mortgage Debt payable on Contingency.*

The words, "mortgage, debt or sum of money," in the Stamp Act, 16 & 17 Vict. c. 59, s. 10, include contingent as well as absolute debts. Therefore where C., being seized of an estate tail in certain property expectant upon the decease without



issue male of N., and also upon the decease of S., executed a disentailing deed, and in consideration of 15,082*l.* mortgaged the property for 38,000*l.*, to be paid within three months after the decease of N. and S., provided N. died without issue male, and C. afterwards sold the property (subject to the mortgage) to M. for 5250*l.*—*Held*, that ad valorem duty was chargeable in respect of the mortgage debt of 38,000*l.* as part of the consideration for the purchase, although it was only payable upon a contingent event which might never happen. *Mortimore, Appellant, v. The Commissioners of Inland Revenue, Respondents*, 838

(2). *Marriage Settlement chargeable with ad valorem Duty in respect of Bonds of Foreign States, and Indian £5 per Cents.*

The 13 & 14 Vict. c. 97, Sched. tit. "Settlement," imposes an ad valorem duty on any deed or instrument whereby any "definite and certain principal sum or sums of money, or any definite and certain share or shares in any of the government or parliamentary stocks or funds," shall be settled upon or for the benefit of any person.—*Held*, that, under that enactment, a marriage settlement was chargeable with ad valorem duty in respect of Brazilian Bonds, New Brunswick Bonds, Nova Scotia Bonds, Scrip Peruvian Loan, Chilean Bonds, Mexican Remanet Bonds, and Indian 5*l.* per Cents., created by statute after the 13 & 14 Vict. c. 97 passed. *In re the Parties to the Marriage Settlement of Ann Alsager and P. E. Guidici, Appellants, and The Commissioners of Inland Revenue, Respondents*, 965

(3). "Stock" and "Consideration

*Money" within the meaning of 13 & 14 Vict. c. 97, Schedule, tit. Conveyance.*

Under the powers of an act of parliament a railway Company sold and transferred their railway and works to another railway Company, and, in consideration thereof, the latter agreed to create and deliver to the shareholders of the former Company preferential shares of the nominal amount of 298,000*l.* bearing 6*l.* per cent. interest, and to take upon themselves a debenture debt of 98,687*l.*, and simple contract debts of that Company to the amount of 40,032*l.*—*Held*: First, that the preferential shares were "stock" within the meaning of the 13 & 14 Vict. c. 97, Schedule, tit. "Conveyance." Secondly, that the liability to pay the debenture and simple contract debts was part of "the consideration money" within that Act. *The Ulverstone and Lancaster Railway Company, Appellants, v. The Commissioners of Inland Revenue, Respondents*, 855

(3 & 4 Wm. 4, c. 27.)

See MORTGAGE.

*Acknowledgment of Debt.*

The Commissioners, under a town improvement Act, being in debt, appointed a finance committee, who made a report to which was appended a schedule of "liabilities" including arrears of salary due to the clerk of the Commissioners more than six years. The Commissioners made an entry in their minute-book that they accepted the report.—*Held*, no sufficient acknowledgment of the debt to take the case out of the Statute of Limitations.

A plea stating that a debt accrued more than six years ago does not afford any defence, as an informal plea of the Statute of Limitations. *Bush v. Martin*, 811

## STOCK.

See STAMP, (3).

## SUBSTITUTED SECURITY.

See DEBTOR AND CREDITOR.

## SUCCESSION DUTY ACT, 1854.

(16 & 17 Vict. c. 51.)

See DOMICILE.

- (1) *Succession to unproductive Land, which during Successor's Lifetime becomes Valuable — Meaning of Term "Annual Value."*

Except in cases for which the Succession Duty Act (16 & 17 Vict. c. 51) specially provides, the value of the "annuity" which forms the basis of assessment of real property for the purposes of that Act, is the actual annual value of the property in its condition, and as used for the purposes to which it is devoted, at the time when the successor becomes entitled in possession. Consequently real property, which at that time is wholly unproductive and incapable of being used productively for agricultural or other purposes, and which is not in the market as building land, though subsequently sold as building land during the successor's lifetime, has not within the meaning of the 21st section of that Act any "annual value," and is not liable to succession duty.—*Held*, by *Pollock*, C. B., and *Wilde*, B. *Dissentiente Martin*, B. *Attorney General v. The Earl of Sefton*,

- (2.) *"Derivative Title" under a Disposition by Will, within 15th section.*

A testator devised his real estate to his wife for life with remainder in fee to R., a stranger in blood. R. died intestate before the Succession Duty Act, 1853. The testator's wife died after the commencement of that Act, when the defendant, heir at law of R., became beneficially entitled in possession to the property so devised:—*Held*, that the property vested in the defendant by a "derivative title" under the disposition made by the will of the testator, within the meaning of the 15th section of the Succession Duty Act, 1853, and consequently the defendant was chargeable, under that section with 10l. per cent. duty, being at the same rate as R. would have been chargeable with. *The Attorney General v. John Perkins Rushton*, 812

## SURVEYOR.

See HIGHWAY.

## TRESPASS.

See EQUITABLE DEFENCE.

LANDS CLAUSES CONSOLIDATION ACT, 1845, (1).

## TROVER.

- (1). *Right of Action in respect of Possessory Title.*

The plaintiff bought and took possession of a barge. The transfer was by bill of sale in the statutory form, but, the plaintiff being under age, the transfer was not registered. In August, 1862, the vendor became bankrupt. Subsequently his assignees registered, but at what date did not appear. On the 3rd of September the plaintiff came of age. On the 6th of November the barge was seized by the messenger in bank-



ruptcy;—*Held*, that the assignees were liable for the conversion of the barge, on the ground that either as against them the property passed by the bill of sale, or the bankrupt was a trustee for the plaintiff and that the action was maintainable by virtue of the plaintiff's possessory title. *Stapleton v. Haymen and Another*, 918

(2). *Evidence of Conversion.*

1. If a principal ratifies the purchase by his agent of a chattel which the vendor had no right to sell, he is guilty of a conversion, although at the time of the ratification he had no knowledge that the sale was unlawful.

Therefore, where the plaintiff's ship was stranded on the coast of Africa, and unlawfully taken possession of and sold by W. to T., the agent of the defendants, merchants at Liverpool, who, on being informed by their agent of the purchase and price, wrote in reply:—"We duly received your letter informing us of your having purchased the brig, but you do not say from whom you bought her, nor whether you have the register with her. *You had better, for the present, make a hulk of her.* From your description of her she is not out of the way in price, if she has not sustained much damage."

—*Held*, a ratification by the defendants of the tortious act of their agent, and sufficient evidence in trover of a conversion by them. *Hilberry v. Hatton and Another*, 822

2. The plaintiff purchased wine lying at the defendant's wharf from the holder of a warrant, given by the defendant for its delivery. The vendor indorsed the warrant generally. The plaintiff sent it so indorsed to the wharf, and obtained samples of the wine. A notice from the Lord Mayor's Court was subsequently

served at the wharf attaching the vendor's goods in the defendant's custody, and a description of the wine was at the time of service indorsed on the back of the notice, and shewn to the defendant's manager. The plaintiff on afterwards producing his warrant at the wharf, and demanding the wine, was told by the manager (the defendant being absent) that the wine was stopped on account of the attachment. The same day the plaintiff's attorney wrote to the defendant to demand the delivery of the wine by 11 o'clock the next day. The defendant's manager called next morning on the plaintiff's attorney after seeing the defendant, and stated that the matter required consideration, and that the defendant would consult his attorney. But the same day at noon a writ was issued.—*Held*: first, that the wine was not in the custody of the law. Secondly, that on these facts there was evidence of a conversion, dissentiente *Bramwell*, B. *Pillott v. Wilkinson*, 72

TRUCK ACT.

(1 & 2 Wm. 4, c. 37.)

"Butty Colliers."

"Butty colliers" working in partnership under a verbal contract with the owner of a colliery, and paid by the yard and ton and sometimes by the day, and, though not allowed to underlet the work or leave it, employing others to assist them, for whose wages they are responsible, are not artificers performing labour for wages within the meaning of the Truck Act, 1 & 2 Wm. 4, c. 37. *Sleeman and Others v. Barrett and Another, Executors of Bennett*, 934

TRUSTEE.

See TROVER, (1).

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If there is a contract for the sale of goods, and the property is to be passed by the buyer, and the goods are measured or weighed by the buyer, it appears by the terms of the contract that it was the intention of the parties that the property should pass to the buyer, it will pass though he has not done the act.

Therefore where the plaintiff sold to the defendant a quantity of fire clay at a certain price per ton, the clay to be carted away by the defendant, at his own expense, and weighed by him at the weighing machine of a third person:—*Held*, that the property in the clay passed to the defendant on the completion of the bargain, and that the plaintiff might recover the price under a count for goods bargained and sold, although the clay had never been weighed. *Turley v. Bates*, 200

(2). *Resale by Vendee of unappropriated Goods to third person whose right Vendor has recognised.*

Where on a contract of sale of a portion of a large quantity of goods in the warehouse of the vendor, the vendee has resold the goods to a third person, whose right to them the vendor has recognised, he cannot afterwards dispute the title of such third person although the specific

goods have never been appropriated to him.

Therefore where the defendants sold 848 barrels of flour to C., who sold them to the plaintiffs, and gave them a delivery order, upon presenting which to the defendants they sold it to them and transferred the flour in their books from the name of C. to that of the plaintiffs.—*Held*, that the defendants were estopped from saying that no property in the flour passed to the plaintiffs, although no specific portion of a larger quantity had been appropriated to them. *Woodley and Jackson v. Clowry and Clowry*, 104

## VENDOTIAN CODE.

THE NEW YORK.

## WARRANTY.

*Description of Vessel in Charterparty — Power of Attorney authorizing Warranty Damage for Breach of Warranty.*

The defendants, shipowners at Liverpool, by power of attorney appointed C. P. their agent, inter alia, to charter their ship "Hannah Easton," or employ her as a general ship, on such terms or in such manner as he should think proper, and generally to represent them in relation to the provisions, and to the said brig, her management or sale, as fully as if they were personally present. The "Hannah Easton" had been an A. 1. ship at Lloyd's, but had run off her letter before the power was executed and was not described as A. 1. in the power. The plaintiff, British shipowner and merchant at New York, having an order from England for a cargo of wheat to be sent to the "Hannah Easton" to carry it from New York to Liverpool

The charter-party, which was not under seal, purported to be made between the plaintiffs and G. P. agent for owners of *the A 1. Br. brig "Hannah Eastee" of Liverpool*. The consignee of the cargo, on learning that the ship was not A 1. at Lloyds, refused to accept. Ultimately he agreed to accept, upon the plaintiffs' agent in England undertaking to pay the extra expense of insurance in consequence of the ship not being A 1. The cargo arrived safe. In an action for breach of warranty of the ship's class the plaintiffs sought to recover the extra expense of insurance which they had repaid their agent.

*Held*:—First, that the description in the charter-party was a warranty that the "Hannah Eastee" was at the date of the charter-party an A 1. ship at Lloyds in England.

Secondly, that the power of attorney authorized the warranty.

Thirdly, that the damage which the plaintiffs had sustained was *legal* damage. *Routh and Others v. Macmillan and Others*, 750

## WILL.

*See DEVISE.*

## WORK AND LABOUR.

### *Payment on Production of Architect's Certificate.*

A declaration alleged that the plaintiff agreed to do certain specified works for the defendant, upon the terms and conditions (amongst

others) that the works were to be executed to the satisfaction of the defendant and his architect, "but no payment was to be considered due unless upon production of the architect's certificate." The declaration averred performance by the plaintiff of all things necessary to entitle him to the certificate, and that he had completed the works to the satisfaction of the architect; and alleged as a breach that the architect unfairly and improperly neglected to certify, and "*so neglected in collusion with the defendant and by his procurement*," whereby the plaintiff was unable to obtain payment.—*Held*, on demurrer, that the declaration disclosed a good cause of action, inasmuch as it imputed fraud in withholding the certificate. *Batterbury v. Vyse*, 42

## WRIT OF SUMMONS.

*See COMMON LAW PROCEDURE ACT, 1852, (1), (2).*

*Proceeding as if personal Service had been effected on Lunatic.*

The Court has power, under the 15 & 16 Vict. c. 76, s. 17, to allow a plaintiff to proceed as if personal service of the writ of summons had been effected, although the defendant is a lunatic, and will so order if satisfied that reasonable efforts have been made to effect personal service, and that the writ has come to the defendant's knowledge. *Kimberley v. Alleyne*, 223

THE END.















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